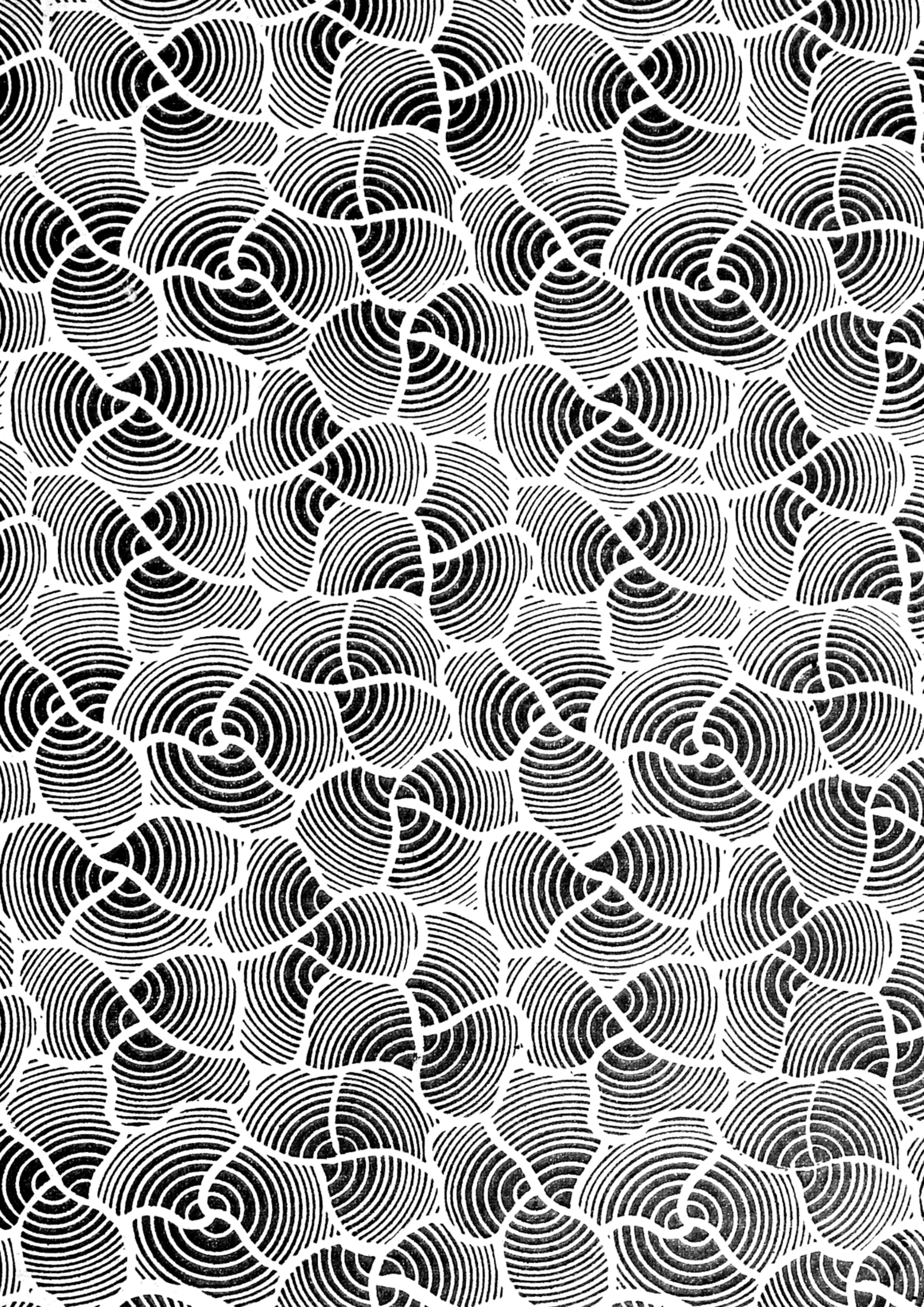

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## PATNA SECTION

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# 1948

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THE

# ALL INDIA REPORTER

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## Patna High Court

**A. I. R. (35) 1948 Patna 1** *[C. N. 1.]*

MANOHAR LALL AND MEREDITH JJ.

*Dr. Sir Kameshwar Singh—Applicant* **v.** *Commissioner of Income Tax, Bihar and Orissa—Opposite Party.*

Misc. Judicial Case No. 86 of 1945, Decided on 10-1-1947, referred by Income Tax Appellate Tribunal, Bombay.

**(a) Income-tax Act (1922), S. 10 (2) (xi) — Bad debt.**

The assessee carried on the business of money lending and a jute mill. In April 1932, the assessee closed the jute mill business and sold the mill reserving to himself the right to realise the outstandings due to the mill from the customers and debtors up to the date of the sale. One of these debts due to the mill amounted to Rs. 158, 000. In the assessment year 1933-34, the income-tax department did not allow this sum as a bad debt of that year on the ground that it had not become irrecoverable and that the assessee should take steps to realise it. The assessee accordingly took steps to realise the sum in the Calcutta High Court and realised only Rs. 10 in 1940. The debt thus became a bad debt in 1940 and in that year the assessee claimed that it should be allowed as a bad debt:

*Held* that (1) if the income-tax department were right in holding that the debt was good in 1934, the mill business having been closed in 1932, the assessee could not claim to set off the debt due to that business as a bad debt in his account, for 1940 as it then became a capital loss: 31 A. I. R. 1944 Pat. 107, *Disting.* [Para 8].

(2) if the decision of the Income-tax Officer that the debt was not bad was wrong the assessee should have taken steps to correct it by the appropriate procedure and not having done so he must face the position that the debt was good in 1934 and became bad in 1940. [Para 9]

*Per Meredith J.*—The fact that the Income-tax Officer wrongly treated the debt as money-lending debt in 1933-34 would not entitle the assessee to a repetition of the mistake in 1940. [Para 17]

**(b) Income-tax Act (1922), S. 10 (2) (xi)—Money-lending business— Bad debt in connection with assessee's other business.**

The assessee carried on a money-lending business. The assessee's patwari misappropriated some amount out of his zamindari income and subsequently executed promissory note in favour of the assessee for the amount. The assessee failed to recover anything on this promissory note:

*Held* that as the amount due under the promissory note was not advanced to the Patwari in the course of the assessee's money-lending business it could not be deducted as a bad debt: 19 A. I. R. 1932 Mad 436 (S.B.), *Disting* [Para 13]

**(c) Income-tax Act (1922), S. 2 (1)—Interest on arrears of rent.**

Interest on arrears of rent relating to agricultural lands is agricultural income within the meaning of S. 2 (1) and as such, exempt from tax under S. 4 (3) (viii): 31 A. I. R. 1944 Pat. 198 (S. B.) *Rel. on.* [Para 15]

*Cases referred :—*

1. ('44) 1944-12 I. T. R. 116 : 31 A. I. R. 1944 Pat. 107: 22 Pat. 727: 213 I.C. 97, Commr. of Income Tax, Bihar and Orissa v. Maharaja of Darbhanga.
2. ('32) 6 I. T. C. 63: 19 A. I. R. 1932 Mad. 436: 55 Mad. 830: 138 I. C. 289 (S. B.), Rajagopala Venkata Narasimha v. Commr. of Income Tax, Madras.
3. ('44) 23 Pat. 374 : 31 A. I. R. 1944 Pat. 198 : 214 I. C. 183 (S. B.) Sm. Lakshmi Daiji v. Commr. of Income-tax, Bihar and Orissa.

*Prem Lall*—for Applicant.

*S. N. Dutt.*—for Opposite Party.

**Manohar Lall J.**—Under S. 66 (1), Income Tax Act, the appellate Tribunal has referred to us three questions for our decision:

"1. (a) Whehter, even if it be taken that the sum of Rs. 1, 62, 260 or any portion thereof was a loss of the jute mill business, it is allowable as a bad debt in the assessment year 1941-42 ?

(In the alternative, if the above question is answered in the negative).

(b) whether, in the circumstances of the case, the irrecoverable debt covered by the decree against Watt Brothers & Co. or any portion thereof, can be said to be a bad debt of the assessee's money-lending business and as such, allowable as an admissible deduction under S. 10 (2) (xi) of the Act?

2. Whether in the circumstances of the case, the irrecoverable debt covered by the promissory note passed by Shyam Lal Das can be considered a bad debt of the assessee's moneylending business and, as such, allowable as an admissible deduction under S. 10 (2)(xi) of the Act.

3. Whether interest on arrears of rent relating to agricultural lands is agricultural income within the meaning of S. 2 (1) of the Act, and, as such, exempt from tax under S. 4 (3) (viii)."

It is convenient to set out the facts regarding each question separately.

[2] *Question No. 1*:- The assessment proceedings relate to the year of assessment 1941-42, the accounting period of the assessee being the Fasli year 1937, that is to say 29-9-1939 to 16-9-1940. The assessee's father purchased the Belliaghatta Jute Mills at Calcutta for a sum of Rupees 6,000,00/- in October or November, 1912. The mill was placed in charge of James Luke and Sons, who were to look after it as managing agents on a remuneration of Rs. 500 a month and a commission at the rate. of five per cent on the net profits of the Mill. In order to supply the managing agents with funds to carry on the business of the Jute Mill, substantial sums were advanced by the assessee's father in 1912, 1913 and 1915. In the last year the amount actually placed in the hands of the managing agents amounted to Rs. 2,50,000. James Luke and Sons executed handnotes for the relevant amounts in favour of the assessee's father—the rate of interest was fixed at 6 per cent per annum. The business was carried on till the date of death of the assessee's father, and after the assessee succeeded to the business on the death of his father on 3-7-1929, the same arrangement was continued with the managing agents. On the 1-4-1932, the running of the Mill was stopped and the assessee sold it to Seth Hukumchand on 21-12-1932 for a sum of Rupees 145,000 reserving to himself the right to realise the outstanding dues to the Mill from the customers and debtors up to the date of the sale. James Luke and Sons in the course of their management of the Mill had lent large sums to Watt Brothers Limited without the permission or knowledge of the assessee. The largest shareholder in the company was James Luke himself. When the accounts were audited. it was found that on 15-12-1932 a sum of 154,433 rupees was due from Watt Brothers Limited.

[3] In the assessment year 1933-34, the assessee showed in his return a sum of Rs. 7,500 as having been realised as interest from James Luke and Sons on the aforesaid sum of Rupees 2,50,000 this was added in the assessable income of the assessee for that year. The assessee at that time also claimed Rs. 1,49,649-0-6 as being a bad and irrecoverable loan due from Watt Brothers Limited. This claim was made under the heading, Bellighatta Jute Mill business. The claim to set off this bad debt was disallowed by the Income-tax Officer by his order dated 23-3-1934, (Ext. T-N) on the ground that he was not satisfied that this debt had become irrecoverable in the previous year. He observed at page 34 that the company, that is to say, Watt Brothers Limited

"used to get advances from the Mills and supply raw jute since several years ago. The transactions terminated in the year ended September, 1931 (1338 FS) resulting in a balance of Rs. 1,49,649-0-6 due against the company. No action has been taken to realise the sum and as it is a due of 1338 FS it is certainly not time-barred. In claiming deduction for bad debt this year (1339 FS) the assesse depends upon a letter from Steward & Co (Stock and Share Brokers) date 18-12-1933 in which they simply state that they made enquiries and learnt that watt Brothers Ltd., was practically solely owned by one Mr. Luke who had no finance and therefore the dues cannot be realised it is not clear what enquiries were made and why a Limited company which is working should not be proceeded against for the dues. Further, Mr. Luke the alleged owner of Watt Brothers Ltd. is none else than Messrs James Luke and Sons, the managing agents of the assessee. It is not clear how the dues became irrecoverable from the assessees own managing agents.

The auditors, Messrs Lov lock and Lewes have not pointed out the amount as a bad debt, and it is hard to believe that they have purposely omitted to do so to shield Messrs James Luke & Sons. The bad debt is not proved."

[4] On the 25-8-1934, the assessee instituted suit No. 1507, of that year on the original side of the Calcutta High Court against James Luke and Sons in which he claimed a decree for Rs. 43, 883 as having been wrongfully spent by the managing agents and also Rs. 1,58,522 as having been lent by them to Watt Brothers Limited instead of buying jute in the market for cash; this figure is arrived at by adding some costs to the figure 1, 54, 433 referred to already (this I find from para. 46, of the judgment of the Appellate Assistant Commissioner). The plaint in this suit was not on the record, but the written statement filed by James Luke and Sons is printed at page 29. In order to clear up the position, it was necessary to have before us the plaint in that suit, and accordingly we called upon the assessee to produce a copy of the plaint. The learned Standing Counsel very rightly did not object to this document being produced before us for the use of the Court and marked by us Ex. 1.

[5] On 24-7-1935, the assessee instituted suit No. 1404 of that year on the original side of the Calcutta High Court against Watt Brothers Limited claiming from them Rs. 1,58,522 together with interest thereon making a total of Rs. 185,108. It is stated in para. 4 of the plaint (which is exhibit T-I at page 28) that James Luke and Sons, managing agents of the Mill,

"used to lend out of the funds of the Mill large sums of money to the defendant on interest at the rate of Rs. 6 per cent per annum for the alleged purpose of buying jute."

The written statement by Watt Brothers is not

on the record, and we are informed that they did not contest the suit. An *exparte* decree was pronounced by the High Court on 18-12-1935 in favour of the assessee for Rs. 1,85,108 plus future interest and costs. In suit No. 1507 of 1934, a compromise decree was passed in June 1937, for a sum of Rs. 43,833, and the assessee abandoned the claim of Rs. 1,58,522 against James Luke and Sons on the grounds that he had already obtained a decree for that amount against Watt Brothers, Limited. In the meantime, the assessee took steps to realise his decree from Watt Brothers Limited. By suit No. 508 of 1936 Mr. S. K. Sen was appointed as the official liquidator to wind up Watt Brothers, Limited on the application made by the assessee as a creditor on the 21-12-1936, but the liquidator was able to give the assessee only Rs. 10-9-0 out of the sum realised by sale of the properties of the Company on 21-6-1940. The assessee, therefore, has claimed the balance which he could not recover as a bad debt.

[6] How has the assessee treated this advance of Rs. 2,50,000 (to James Luke and Sons) in his account books and how has he represented this transaction to the High Court at Calcutta and to the Income-tax authorities in several years ? Exhibit T-I is an extract from list of loans for 1339 Fasli filed along with the return made under S. 22, Income tax Act by the assessee for 1933 assessment It gives a tabular list of a number of debtors for the period 1-4-1931 to 30-9-1932. In the third column the balance of the sum advanced at the end of 1338 Fasli is shown. In the fifth column is given the figure for any part of the principal sum realised in 1339 Fasli and in the sixth column the interest on the loan realised in 1339 Fasli is shown and at the close of 1339 Fasli the balance of the principal is shown. The fifth debtor is James Luke and Sons. At the end of 1338 Fasli Rs 2,50,000 is shown as advanced to them, but in the fifth column the whole of this Rs. 2, 50,000 is shown as having been realised, and in the sixth column the interest realised is shown at Rs. 7, 500 in 1339 Fasli., and, as was to be expected, the seventh column shows that the balance at the close of 1339 Fasli was nil. This shows conclusively to my mind that the assessee accepted the position that Rs. 2,50,000 which had been advanced by him to James Luke and Sons had been repaid by them in 1339 Fasli and was then treated as having been spent by the managing agents in the course of and for the jute business. After 1339 Fasli, the assessee has never shown any interest as having been realised or due from James Luke and Sons on the whole or any part of this Rs. 2,50,000. It is important to remember that the year 1339 Fasli ends on 30-9-1932 and this is the very year in which the Mill was closed down in April.

[7] In the assessment proceedings for 1933-34 the assessee did not claim this amount as a bad debt in his money-lending business but as a bad debt of Beliaghatta Jute Mills, Calcutta, (see page 34 of the paper book). I have already drawn attention to this. In appeal from that assessment the assessee maintained the same position (see page 35 para. 53). In the plaint of the suit against Watt Brothers Limited, I have already pointed out that the assessee clearly stated in para. 4 that Rs. 158,522 was lent by the Managing Agents out of the funds of the Mill. The plaint of the suit against James Luke and Sons does not proceed on the basis that a certain sum out of Rs. 250,000/a still remins unpaid but proceeds on the allegation that James Luke and sons acted fraudulently and negligently in lending out Rs. 1,58,522 odd to Watt Brothers.

[8] In the face of these clear facts it must be held that Rs. 1,58,522 was not a money, lending debt but was a debt due to the Belliaghatta Jute Mills which was closed in April 1932. It must also be held that this amount became a bad debt in the year 1940. Learned counsel for the assessee complained bitterly that the income-tax department have treated the assessee unfairly. He points out that in the year 1933-34 the income tax department would not allow this sum as a bad debt of that year on the ground that it had not yet become irrecoverable and that the assessee should take some steps to realise this sum. Accepting that order as correct, argued the learned counsel, the assessee proceeded to take steps to realise this sum in the Calcutta High Court and as I have already observed he realised only Rs. 10 in the year 1940. It is, therefore, argued that it is not open to the income-tax department to refuse to allow this as a bad debt in the year in which it has really become bad. In my opinion, it is impossible to give any relief to the assessee. The matter can be looked at only from two points of view. Either the income-tax department were right in holding that the debt had not become bad in 1934 or they were wrong in so holding. If the income-tax department were right in holding that the debt had not become bad in 1934 the assessee can have no grievance if he agreed with the income tax department and treated the debt as if it were a good debt in that year. The jute mill business having been closed down in 1932 the assessee can, not claim to set-off the loss in that business in his account for the year 1940, as it then became a capital loss. In the course of the argument I put to learned counsel the question that if the debt of the Jute Mill business was actually a good debt not only in the view of the in-

come-tax department but also having regard to the financial position of the debtor how could the assessee claim this as a bad debt of the Jute mill business some years later after the jute mill business had been closed. The answer must be against the assesee in such a contingency. This is exactly what has happened in the present case. The assessee accepted the decision of the Income-tax Officer as correct and, therefore, he cannot complain.

[9] The other alternative is that the decision of the Income-tax Officer was wrong and that the debt should have been treated as a bad debt in 1934. The remedy of the assessee was to appeal against the order as he did, but he failed before the Appellate Assistant Commissioner on 21-5-1936. The assessee should have then moved the Commissioner under S. 33 of the Act which was then in operation and should have also asked for a reference to the High Court under S. 66. Not having taken recourse to these proceedings, the assessee now must face the position that a good debt of the Beliaghatta Jute Mill which was closed in 1932 has now become irrecoverable in 1940.

[10] For these reasons the answer to question No. 1 (a) must, in my opinion, be in the negative. Learned counsel, however, also argued that this should be treated as a bad debt of the assessee's money lending business. He relies principally on the fact that Rupees 2,50,000 was admittedly advanced to James Luke and Sons, that the assessee realised Rs. 7,500 as interest in 1339 Fasli and that that amount was included in his taxable income of that year. The difficulty, however, in accepting this argument as correct is that the assessee has not shown that Rupees 1,58,522 remained due to the assessee as a part of the sum advanced to James Luke and Sons. I have already shown that in the plaint of the suit against James Luke and Sons no such claim was made nor is such a claim consistent with the allegation in the plaint of the suit against Watt Brothers Limited. I have also shown that in the list of loans for 1339 Fasli the assessee is shown to have received the whole of this Rupees 2,50,000. Again no claim was ever advanced before the income-tax authorities that this Rupees 1,58,522 is a bad debt of the money-lending business.

[11] Learned counsel for the assessee relies strongly upon the decision of this Court pronounced by me sitting on the Division Bench in the case of the present assessee reported in 1944 I. T. R. 116.[1] But in that case the facts found were entirely different I am quoting from page 126:

"The Maharaja entered into money-lending business by advancing Rs 32,00,000 to Kunwar Ganesh Singh. That business fell into bad ways and the business was wound up, the Maharaja taking over all the assets of the business including the debts due from the customers to Kunwar Ganesh Singh who was the agent of the business."

In the present case the facts are otherwise, viz., the assessee has been repaid the sum of Rs. 2,50,000 which he advanced to James Luke and Sons in the manner indicated above. I have, therefore, come to the conclusion that the answer to question 1 (b) must also be in the negative.

[12] *Question No. 2*:— Shamlal Das was an employee under the assessee and acted as Patwari in has zemindari. On taking the account it was discovered that Shamlal Das had misappropriated some money out of the zemindary income. As a result of settlement of accounts, Shamlal Das excuted a promissory note in respect of the fund which he had embezzled in September, 1934. The assessee instituted a suit to recover the sums due on the handnote and on 31-10-1938, he obtained a decree but nothing could be realised from the Patwari. The assessee claims that this amount should be treated as irrecoverable loan and allowed to him as a loss in his money-lending business. It is found as a fact by the income-tax authorities that this debt was not a true debt lent out in the ordinary course of the moneylending business. They have pointed out that

"It has not been shown even before us that the promissory note in question was treated as part of the money-lending transaction of the appellant. The appellant unquestionably is a big money-lender and keeps account of his money-lending transactions but this promissory note was obtained not for any money advanced to him but in consideration of the amount due on account of zamindary collections embezzled."

[13] Section 10 (2) (xi) of the Act provides that in the case of an assessee carrying on a banking or money-lending business

"such sum in respect of loans made in the ordinary course of such business as the Income-Tax Officer may estimate to be irrecoverable. . . ."

should be allowed as a deduction. On the facts found this loan was not made in the ordinary course of moneylending business and, therefore, this bad debt cannot be allowed to the assessee.

[14] Reliance was placed upon the oft-cited case in 6 I. T. C. 63.[2] In that case, however, the question was not whether any bad debt should be allowed as an admissible deduction but whether the interest which was received by an assessee due to him on promissory notes executed in his favour by the defaulting tenants was assessable.. Ramasam J. who delivered the judgment observed that

"In this case by a fresh contract between the zemnidar and the ryots the actual character of the liability has been changed into a loan. It has ceased to be rent and has become merely a loan"

The assessee's argument was not accepted that this interest which was received by him

should be treated as agricultural income. This decision is of no help to the assessee on the facts found in the present case. For these reasons, the answer to question No. 2 is in the negative.

[15] *Question No 3*:—It is unnecessary to give the facts as it is agreed that the answer to this question is in the affirmative on the authority of the decision pronounced by this Court in 23 Pat. 374.[3] The sum involved is Rs. 1,67,603.

[16] As the assessee has failed with regard to his claim for Rupees 1,58,522 and also with regard to the claim for Rs. 796 but has succeeded with regard to his claim for Rs 1,67,603, each party will bear his own costs of the hearing in this Court.

[17] **Meredith J.**—I agree. Upon question No. 1, it seems to me impossible to hold that the loss was in the assessee's money-lending business. Neither the suit against James Luke and Sons nor that against Watt Brothers was a suit upon a loan or framed as such. It was a loss in his jute business incurred through the misfeasance of his managing agents. It is no doubt hard that the assessee should be first put out as being premature and then as too late. But if the Income-Tax Officer wrongly took the view in 1933-34 that the sum outstanding (which he refused to regard as irrecoverable then) was a money-lending debt, and the assessee accepted that instead of taking the matter to the highest tribunal, that it seems to me can give him no claim to have the mistake repeated in 1940 in his favour. The money may have become irrecoverable in 1940, but it can then only be regarded as a capital loss of a defunct business. It cannot possibly be treated as a trading loss of the assessment year.

G.N. *Answer accordingly.*

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## A. I. R. (35) 1948 Patna 5 *[C. N. 2.]*

REUBEN J.

*Ram Prasad Ojha and another — Petitioners* v. *Maheshanand Pandey — Opposite Party.*

Civil Criminal Revn. No. 13 of 1946. Decided on 26-11-1146, from order of Addl. Collector, Arrah, D/-21-5-1946.

**(a) Criminal P. C. (1898), Ss. 195 (1) (c) and 476—Offence mentioned in S. 195 (1) (c) committed by person not party to Court proceedings—Applicability of S. 476.**

Section 195 (1) (c), Criminal P. C., provides a bar to a prosecution only where an offence mentioned therein is alleged to have been committed by a party to a proceeding in any Court. There is no bar if the offence is committed by somebody who is not a party to such proceeding. Where an offence mentioned in S. 195 (1) (c) is committed by a person who is not a party to such a proceeding, no occasion arises for proceedings under S. 476, and the provisions of that section do not come into operation at all. [Para 4]

Annotation:—('46-Com) Criminal P. C., S. 195, N. 11 Pt. 1; N. 12 Pt. 1.

**(b) Criminal P. C. (1898), S. 476—*A* and *B* claiming mutation on basis of different sale-deeds — Deeds found forged—*A* and *C*, *B*'s husband, proceeded under S 476, for offence under S. 471, Penal Code—Held proceeding against *C* was not maintainable as *C* was neither party to proceedings nor to the offence with which *A* was charged.**

By reason of S. 195, the jurisdiction of the Court to proceed under S. 476, arises only when the offence is alleged to have been committed by a party to the proceeding. But once the Court gets jurisdiction and proceeds under S. 476, it is empowered to deal with the offence as a whole, and is not bound to confine its complaint only to the party and may complain also against a person who is not a party but who has participated in the commission of the offence. [Para 5]

*A* and *B* applied for mutation of certain property in their name separately, relying on two different sale deeds. The deeds were found to be forged and *A* and *B*'s husband *C* were proceeded against under S. 476, Criminal P. C. for an offence under S. 471, Penal Code:

*Held*, that the proceedings against *C* could not be maintained as *B*, his wife and not *C* was a party to the proceedings in which the forged document was filed, nor could *C* be charged along with *A* as the document in respect of which *C* was proceeded against was different from that for which *A* was prosecuted and *A* had nothing to do with it. 18 A. I. R. 1931 Bom. 305, *Disting.* [Para 5]

**(c) Criminal P. C. (1898), S. 476—Failure to come to express finding whether prosecution is in the interest of justice under S. 476, does not render order for prosecution invalid—Express finding not necessary—In cases of grave offences such consideration can be presumed or even High Court can consider it in revision - Proceedings under S. 476, in the case held proper.**

Although it is will established that the Courts must consider whether a prosecution is necessary in the interest of justice as required by S. 476, Criminal P. C., the failure to come to an express finding on the point does not necessarily render the order invalid. It is sufficient if record shows that the Court applied its mind to the point and in a case where a grave offence is alleged to have been committed it would be unreasonable for the Court to take the view that the point was not considered. In the last resort, the High Court may consider the point in revision if it appears to have not been considered by the Courts below: *Case law referred.* [Para 6]

Where the allegations against a person proceeded against under S. 476, were of a serious fraud and a serious case appeared to have been made out showing reasonable chance of conviction:

*Held*, it was necessary, in the interest of justice, that the matter should be taken to Criminal Court and hence the proceedings taken under S. 476, were proper. [Para 7]

Annotation:—('46-Com.) Criminal P. C. S. 476, N. 13, Pt. 9.

*Cases referred*:—

1. ('45) 24 Pat. 174: 32 A. I. R. 1945 Pat. 362: 221 I. C. 471, Mathur Prasad v. Pitambar Singh
2. ('31) 55 Bom. 461: 18 A. I. R. 1931 Bom. 305: 133 I. C. 269, Emperor v. Balgaunda Ramgaunda.

3. ('28) 55 Cal. 1312: 15 A. I. R. 1928 Cal. 862: 113 I. C. 842, Keramat Ali v. Emperor.
4. ('30) 17 A. I. R. 1930 Cal. 352: 126 I. C. 416, Surendra Nath v. Kumeda Charan.
5. ('33) 20 A. I. R. 1933 Cal. 147: 144 I. C. 88, Nabani Nath v. Emperor.
6. ('33) 56 Mad. 157: 20 A. I. R. 1933 Mad. 67: 140 I. C. 323, In re C. Ramayya.
7. ('37) 24 A. I. R. 1937 Pat. 534: 172 I. C. 237, Nand Kumar v. Emperor.
8. ('30) 17 A. I. R. 1930 Cal. 705: 129 I. C. 110, Satis Chandra v. Emperor.
9. ('31) 58 Cal. 1117: 18 A. I. R. 1931 Cal. 190 : 132 I. C. 160, Superintendent and Remembrancer of Legal Affairs, Bengal v. Ijjatulla Paikar.
10. ('31) 58 Cal. 965 : 18 A. I. R. 1931 Cal. 760 : 134 I. C. 914, Nawabali Khan v. Chandra Kanta.

*A. B. N. Sinha*—for Petitioners.

*Brahmadeo Narain and Harians Kumar* — for Opposite Party.

**Order.**—This is a petition in revision against an appellate order of the Additional Collector of Shahabad, upholding an order of the Land Revenue Deputy Collector of Shahabad under S. 476, Criminal P. C. directing the prosecution of the petitioners of offences under S. 471, Penal Code.

[2] The case arises out of mutation proceedings before the Land Revenue Deputy Collector in which petitioner 2, Ramanuj Pandey, and Jaisrani Kuer, wife of Ram Prasad Ojha (petitioner 1), and other persons were applicants. The claim of Jaisrani Kuer was based upon a sale deed said to have been executed by the opposite party, Mahesha Nand Pandey and his wife, Adhikari Kuer, on 3-8-1943, and registered on 7-8-1943. Ramanuj Pandey claimed under another sale deed purporting to have been executed by Mahesha Nand, and executed and registered on the same day as the other sale deed. Separate applications were made by Jaisrani Kuer and Ramanuj Pandey for mutation; but the cases were dealt with analogously by the Land Revenue Deputy Collector. The mutation was opposed, among others by Mahesha Nand and his wife, Adhikari Kuer, on the allegation that there was no such sale as alleged, and that both the sale deeds were forgeries. In support of Jaisrani's sale deed, certain other documents were put forward by the applicants, namely, a Mahadanama (Ex. 1), under which Adhikari Kuer purported to enter into an agreement for the sale of the property, and number of handnotes, purporting to have been executed by Adhikari Kuer, which are said to have formed part of the consideration for the sale deed. All these documents and the two sale deeds purported to bear the thumb-impressions of the executant.

[3] Evidence was entered into before the Land Registration Deputy Collector both on the question of possession and of the genuineness of the sale deeds. Amongst other evidence adduced on the latter point, there are the depositions of two expert witnesses, according to one of whom the thumb impressions are genuine, while according to the other they are not genuine, but are impressions made by means of blocks. Both points were decided by the Land Registration Deputy Collector against the applicants, and he, accordingly, rejected the applications by his order dated 9-4-1945. Appeals against this order to the Collector and the Commissioner were dismissed on the point of possession; but the Commissioner also made a reference to the sale deeds in the following terms:

"There is overwhelming evidence to show that the petitioners are not in actual possession and, on that ground alone, the application must be rejected even though it may be conceded that on the basis of the sale deed, on the genuineness of which two handwriting experts differed, the petitioners may claim a semblance of title."

The present proceedings started on the application of Mahesha Nand Pandey and Mt. Adhikari Kuer, who asked for the prosecution of eleven persons connected with the mutation proceedings. The Land Registration Deputy Collector rejected the petition except as to the present petitioners, one of whom, as I have mentioned, was an applicant for mutation. The other, Ram Prasad Ojha, was merely the husband of an applicant, and deposed as a witness in the case. It is probable that he also acted on her behalf in the case, because, in his order under S. 476, the Land Registration Deputy Collector says that "these people" (meaning thereby the two petitioners) produced the sale deeds and handnotes, and put them in Court as evidence.

[4] On behalf of petitioner, Ram Prasad Ojha, it is urged that his case falls within the rule laid down by a Division Bench of this Court in 24 Pat. 174.[1] It was decided in that case that S. 476, Criminal P. C. must be read along with S. 195, sub-s. (1), cls. (b) and (c) of the Code, that the latter section creates a bar to the institution of a prosecution in certain classes of cases, and that the former section provides the procedure by which alone that bar, when it exists, may be removed. In their Lordships' opinion, a Court has jurisdiction to proceed under S. 476 only when under S. 195 a bar to prosecution for the particular offence exists. The offence with which we are concerned is one under S. 471, Penal Code, which is one of the sections mentioned in cl. (c) of sub-s. (1) of S. 195. This provides a bar to a prosecution where such offence is alleged to have been committed by a party to a proceeding in any Court. There is no bar if the offence is committed by somebody who is not a party to such proceeding. Hence if such an offence is committed by some one, who is not a party to such a proceeding, no occasion arises for proceedings under S. 476 and the provisions of that section do not come into operation at all.

[5] On behalf of the opposite party, my attention is drawn to the decision in 55 Bom. 461.[3] It was pointed out there that, although the two sections are connected with each other, the scope of S. 476 is somewhat wider than that of S. 195. It is true that, by reason of S. 195, the jurisdiction of the Court to proceed under S. 476 arises only when the offence is alleged to have been committed by a party to the proceeding. Once the Court gets jurisdiction however, and proceeds under S. 476, it is empowered to deal with one offence as a whole, and is not bound to confine its complaint only to the party, and may complain also against a person who is not a party but who has participated in the commission of the offence. It is urged that in the case before me, Ramanuj Pande, a party to the mutation proceeding, was alleged to have committed an offence, and, therefore, the Court had jurisdiction to proceed also against Ram Prasad Ojha. I cannot agree that the facts of the Bombay case are applicable to the present case for the two petitioners are being proceeded against in respect of different offences, although both the offences happen to be under the same section. Under S. 195, cognizance, except on the complaint of the Court concerned, is prohibited of an offence under S. 471, Penal Code, when such offence is alleged to have been committed by a party to any proceeding in any Court "in respect of a document produced, or given in evidence, in such proceeding." The document, on which the case against Ram Prasad Ojha depends, is the sale deed in favour of Jaisrani. Ramanuj Pandey had nothing whatever to do with that document, and it cannot be suggested that he has committed any offence in respect of that document. Hence, so far as that offence is concerned, the bar under S. 195 does not arise and the Court has no jurisdiction under S. 476, and as regards the other document jurisdiction under S. 476 exists, but the offence alleged does not touch Ram Prasad Ojha. I have, therefore, no doubt that, so far as Ram Prasad Ojha is concerned, the direction under S. 476 is without jurisdiction, and must be set aside.

[6] As regards the second petitioner, the position is quite different. This is a petition in revision, and I can only interfere in the limited circumstances set out in S. 115, Civil P. C. No question of jurisdiction arises, and the main contention is that the Courts below committed a material irregularity by not considering, as required by S. 476, Criminal P. C. whether a prosecution was necessary in the interests of justice. It is well established that this point must be considered by the Court: 55 Cal 1312,[3] A. I. R. 1930 Cal. 352,[4] A. I. R. 1933 Cal. 147,[5] 56 Mad. 157[6] and A. I. R. 1937 Pat. 534.[7] The failure to come to an express finding on the point, however, does not necessarily render the order invalid. It is sufficient if the record shows that the Court applied its mind to the point: A. I. R. 1930 Cal. 705[8] and 58 Cal. 1117[9] and in a case where a grave offence is alleged to have been committed it has been held that it would be unreasonable for the Court to take the view that the point was not considered : 58 Cal. 965[10] In the last resort, the point may be considered by this Court in revision, if it does not appear to have been considered by the Courts below.

[7] The Land Deputy Collector has ordered the prosecution on the finding that a *prima facie* case has been made out—a finding which was considered insufficient in 58 Cal. 1117[9] at P. 1122. The Additional Collector does not seem to have considered even whether a *prima facie* case has been made out. I have, therefore, perused the record of the mutation proceedings and the judgment of the Land Deputy Collector in that case. In that case, the Deputy Collector came to a definite finding that the documents in question were forged. That finding was based on several grounds, many of them observations of the Deputy Collector himself. Also it was based on the opinion of an expert whose evidence the Deputy Collector preferred to that of the expert on the other side. On a perusal of the evidence of the expert relied on by the Deputy Collector, I find that there are certain statements in it which require the serious consideration of the Courts—statements which I refrain from discussing because such a discussion on the insufficient materials appearing on the record may prejudice the accused. The expert was not cross-examined in detail, and the grounds on which he based his opinion are not set out at any length or with all the necessary particulars. The materials necessary for coming to a finding as to whether the opinion expressed by him is correct or not are, therefore, not before the Court. At present, however, it is not necessary to come to a finding on this point. It is only necessary to see whether there is a serious case made out and whether there is a reasonable chance of a conviction. It appears to me that these conditions are satisfied in this case and, as the allegation is one of a serious fraud, it is necessary, in the interests oi justice, that the matters should be taken to the criminal Courts, I, therefore, find myseif unable to interfere.

[8] On the above grounds, I allow the petition of the petitioner Ram Prasad Ojha, and withdraw the complaint as against him. The petition of Ramanuj Pandey is dismissed.

D.R. *Order accordingly.*

## A. I. R. (35) 1948 Patna 8 *[C. N. 3.]*

DAS J.

*Kamla Prasad—Petitioner* v. *Emperor.*

Criminal Rev. No. 1262 of 1946, Decided on 7-1-1947, against order of Sessions Judge, Champaran, D/-16-9-1946.

**(a) Food Grains Control Order (1942), Cl. 3(1) and (2)—"Undertaking" in sub-cl. (1) means trade or business—Purchase of more than 20 maunds of food grain without license—Without proof of purchaser engaging in undertaking, purchase does not amount contravention of Cl. 3 (1) — Purchase for storage—No proof that purchase was for sale—Cl. 3 (2) has no application — Presumption in Cl. 3 (2) does not arise: 31 A I.R. 1944 Pat. 308 and 32 A.I R. 1945 Pat. 78,** *Rel. on*; 32 A.I.R. 1945 Mad. 356, *Dissent.*; 31 A.I.R. 1944 Mad. 451 and 31 A.I.R. 1944 Mad. 452, *Ref.* [Paras 3, 4 & 5]

**(b) Interpretation of statutes—Penal enactment—Penal Clause must be strictly construed.** [Para 3]

**Annotation** (46-Com.) Criminal P. C. Pre. N. 2.

*Cases Referred :—*

1. ('44) 25 P.L.T. 81: 31 A.I.R. 1944 Pat. 308: 217 I.C. 229, Raghubar Lal v. Emperor.
2. ('44) 25 P.L.T. 91. 32 A.I.R. 1945 Pat. 78: 218 I.C. 180, Maksudan Ram v. Emperor.
3. ('45) 32 A.I.R. 1945 Mad. 356, In re Valappil Ammotty.
4. ('44) 31 A.I.R. 1944 Mad. 451: 216 I.C. 192, In re Uduman Taraganar.
5. ('44) 31 A.I.R. 1944 Mad. 452: I.L.R. (1944) Mad. 448, Public Prosecutor v. Venkayya.

*K. N. Lal*—for Petitioner.

*Copal Prasad.*—for the Crown.

**Order.** — The petitioner, Kamla Prasad, has been convicted under Rule 81 (4), Defence of India Rules, and sentenced to undergo rigorous imprisonment for two months. It was alleged that he has contravened the provisions of cl. 3, Food Grains Control Order, 1942, (hereinafter referred to as the Control Order). The facts are the following. The prosecution case was that on 16-2-1946, one Sheonath Kumar (P.W.1), who is a Market Inspector went to the Chainpatia Bazar, and found four cartloads of rice ready to leave the market for some other place. The petitioner, claimed that he had purchased the bags of rice on the four carts, which on weighment were found to be about 60 maunds. The Market Inspector then submitted a report to the Sub-Divisional Magistrate, on which the case against the petitioner was started. The defence of the petitioner was that the rice did not belong to him exclusively, but to him and his three brothers. This defence of the petitioner has not been accepted by the Courts below.

[2] The main contention raised on behalf of the petitioner is that his conviction for a contravention of cl. 3 of the Control Order is bad in law. Clause 3 of the Control Order, so far as is relevant for our purposes, is in the following terms :

"(1) No person shall engage in any undertaking which involves the purchase, sale or storage for sale, in wholesale quantities of any food-grain except under and in accordance with a licence issued in that behalf by the Provincial Government or by an officer authorised by the Provincial Government in this behalf.

* * * *

(2) "For the purpose of this clause any person who stores foodgrain in quantities exceeding 50 maunds may, unless the contrary is proved, be deemed to store the foodgrain for the purposes of sale."

There are certain provisos to sub-cl. (1) which are not directly relevant for our purpose. The learned Magistrate who tried the petitioner, was of the view that the petitioner had stored rice exceeding 50 maunds, and under sub-cl. (2) he would be deemed to have stored the food grain for the purpose of sale, unless the contrary was proved. He, therefore, convicted the petitioner on the footing that he had stored 60 maunds of rice for sale without a license, and had thus contravened cl. 3 of the Control Order. The learned Sessions Judge, who heard the appeal, proceeded on a different footing. He stated as follows:

" As I understand cl. 3 (1) of the Order, the puchase of foodgrain in excess or 20 maunds is prohibited except under a license granted by a competent authority. It is not necessary to establish that the foodgrain was purchased for the purpose of sale. It may have been purchased for any purpose, but if it is in excess of 20 maunds and without a licence, the purchaser will have contravened the aforesaid clause."

[3] The learned Sessions Judge appears, therefore to have held that the petitioner had contravened cl. 3 (1) of the Control Order, because he had purchased rice exceeding 20 maunds in weight He held that the act of the petitioner in purchasing 60 maunds of rice did not amount to 'storing', as that word is generally understood. In order to appreciate the point raised on behalf of the petitioner, it is necessary to refer to cl. 2 of the Control Order which defines certain expressions used in the Control Order. One of these expressions is "purchase in wholesale quantities." According to cl. 2 of the Control Order, this expression means purchase in quantities exceeding 20 maunds is any one transaction, and includes purchase by any person on behalf of another as a commission agent or as *arhatiya*. Therefore, the expression "purchase in wholesale quantities", occurring in cl 3 of the Control Order means purchase of foodgrain exceeding 20 maunds in any one transaction. It is not contested before me that rice is foodgrain to which the Control Order applied. It is also not contested before me that the petitioner did not have a license for the purchase The question, therefore, is if the view of the learned Sessions Judge is correct. namely, that any purchase of foodgrain which exceeds 20 maunds requires a licence and in the absence of such a license, the purchase becomes a contravention of cl. 3 of the Control Order. In my opinion

the proposition in the wide terms in which it has been laid down by the learned Sessions Judge is not correct in law. The important words in clause 3 (1) to which the learned Sessions Judge does not appear to have given effect to are: "No person shall engage in any undertaking etc." It is the engagement in an undertaking involving the purchase, sale or storage for sale in wholesale quantities, that is prohibited under cl. 3 of the Control Order. The expression "undertaking" has been explained in R. 81 (1) of the Defence of India Rules; it means any undertaking by way of any trade or business and includes the occupation of handling, loading or unloading goods in the course of transport. The Control Order is an order made under sub-rule (2) of R. 81. The expression "undertaking" used in the Control Order should ordinarily have the same meaning as it has in the parent rule, under which the Control order has been made. Under R. 3, Defence of India Rules, the General Clauses Act, 1897, shall apply to the interpretation of the rules as it applies to the interpertation of a Central Act. Under S. 20, General Clauses Act, expressions used in a notification, order, scheme, rule, form or bye-law shall have the same meaning as in the Act or Regulation under which the notification, order, etc. are made, unless there is anything repugnant in the subject or context. It is, however, not clear if the General Clauses Act will apply to the interpretation of expressions used in the Control Order. Apart from the provisions of the General Clauses Act, 1897, on general grounds the expression "undertaking" occurring in the Control Order should have the same meaning as it has in R. 81 unless there is anything repugnant in the subject or context. It would be unusual to use an expression in the Control Order and give it a meaning different from the one which the expression has in the parent rule, under which the Control Order has been made. There are other provisions in the Control Order which also indicate that the expression "undertaking," has been used in the sense of trade or business. The first proviso to cl. 3 (1) as well as cl. 4 show that a licence is required when a person engages in a trade or business, which involves the purchase, sale or storage for sale in wholesale quantities of any foodgrain. A purchase made by a consumer, who may have a large number of members in his family, even though the purchase exceeds 20 maunds, cannot be said to be engaging in an undertaking, taking the expression "undertaking" in the sense of trade or business. My view, therefore, is that mere purchase of foodgrain exceeding 20 maunds in weight or mere possession of foodgrain exceeding that quantity does not amount to a contravention of cl. 3 of the Control Order. The essence of the contravention, is engaging in an undertaking which involves the purchase, sale or storage for sale in wholesale quantities of any foodgrain without a licence. The emphasis is on engaging in an undertaking, that is, trade or business. I am fortified in this view by two single Judge decisions of this Court, 25 P. L. T. 81[1] and 25 P. L. T. 91.[2] In both those decisions, cl. 3 of the Control Order came to be considered, and among other questions, the question of possession of more than 20 maunds of foodgrain was considered in relation to cl. 3 of the Control Order. In the first decision it was observed as follows:

> "In framing the charge, the Magistrate seems not to have noticed that the Food Grains Control Order did not prohibit possession without a licence, but prohibited the engaging in any business without a licence. Mere possession not for purposes of sale does not appear to be touched by Cl. 3 of the Food Grains Control Order, but the charge does not say that the petitioner was in possession of the commodities for purpose of sale. Unless it was shown that he held the commoditties for sale or in the course of a business with which he was engaged, possession would not amount to an offence under the Food Gains Control Order."

Similar observations were made in the second case also. It is true that the observations made above related to the question of possession, and not to the purchase in one transaction of foodgrain exceeding 20 maunds in weight. But the observations support the view that the emphasis is on "engaging in an undertaking which involves a purchase in wholesale quantities of any foodgrain." If the intention was to prohibit all purchase of foodgrain exceeding 20 maunds in weight, then it was not necessary to use the expression "engage in any undertaking.' That expression must be given its proper meaning in the Control Order. My attention has been drawn to a Single Judge decision of the Madras High Court in A I. R. 1945 Mad. 356,[3] where a view similar to that of the learned Sessions Judge has been expressed, namely, that the purchase of foodgrains in wholesale quantities without a licence and nothing more amounts to a contravention of cl. 3 (1) of the Control Order. The difficulty namely, that this view gives no effect to the words "engage in any undertaking." occurring in the Clause, was realised in the said decision, and it was observed that there was some force in that contention. Reliance for the view expressed in that decision was placed on two earlier decisions in A. I. R. 1944 Mad. 451[4] and A. I. R 1944 Mad. 452.[5] I have examined the facts of both those decisions, and it appears that there was no dispute there that the accused person was a trader. In A. I. R. 1944 Mad. 451[4]

it was observed that the word "undertaking" meant "an enterprise" and the enterprise in that case was that of a trader. In A. I. R. 1944 Mad. 452[5]: the admitted position was that the accused person was carrying on a wholesale trade in paddy and rice. In both those decisions the main question was whether storage should be in connection with a contract entered into before the storage or a future contract. It was held that if a person undertook to trade and if he stored foodgrains in wholesale quantities for sale in future under contracts to be entered into in the future, he was guilty of an offence punishable under cl. 3 of the Control Order I must say, with all respect, that those decisions are no authority for the view that the words "engage in any undertaking" are a mere surplusage in cl. 3 of the Control Order. It is well settled that a penal clause must be strictly construed and the words "engage in any undertaking" must be given there proper meaning in cl. 3 of the Control Order.

[4] In the particular case before me, the prosecution has not alleged nor proved that the petitioner has any trade or business of dealing in rice. Witnesses were examined on behalf of the petitioner who say that the petitioner had no grain shop nor did he deal in grain. That evidence appears to have been accepted by the Court of appeal below. When the petitioner purchased 60 maunds of rice, he did not engage in any undertaking in the sense of trade or business. For aught we know, he may have purchased the rice on behalf of himself and other co-sharers or members of the family. It was for the prosecution to prove that he had engaged in an undertaking which involved the purchase of foodgrain in wholesale quantities. Mere purchase of more than 20 maunds at a time without proof of engaging in an undertaking does not, in my opinion, amount to a contravention of clause 3, Control Order.

[5] As to sub-cl. (2) of cl. 3, Control Order, I do not think it has any application. This is not a case of storing foodgrain for sale, and I think the appellate Court took the correct view as to the mening of the expression "storage for sale". Learned counsel for the Crown has suggested that the act of the petitioner may be taken to be an act preparatory to storage and would, therefore, be deemed to be a contravention under R. 121, Defence India Rule. Even if it be conceded that the purchase in this case was for the purpose of storage though the purchase might have been for other purposes such as home consumption, the prosecution, must prove that the storage was for sale. The presumption mentioned in sub-cl. (2) of cl. 3, Control Order can arise only when there is storage; no such presumption arises out of a mere purchase or out of an act preparatory to storage. I do not, therefore, think that this case can be considered as a case of storage; nor do I think that sub-cl (2) of cl. 3 Control Order has any application.

[6] For the reasons given above, the conviction of the petitioner for a contravention of cl. 3, Control Order is bad. The prosecution has failed to prove that the petitioner has covtravened cl. 3, Control order. The application must, therefore, be allowed, and the rule made absolute. The conviction and sentence passed against the petitioner must be set aside. The order of forfeiture passed by the learned Magistrate is also set aside.

V.B.B. *Conviction set aside.*

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## A. I. R. (35) 1948 Patna 10 [C. N. 4.]

MEREDITH AND RAY JJ.

*Jena Munda—Defendant — Appellant* v. *Dukhan Pahan, Plaintiff and others, Defendants—Respondents.*

Appeal No. 1125 of 1944, Decided on 15-10-1946, from appellate decree of Addl. Judicial Commissioner, Chota Nagpur, D/- 13-7-1944.

**(a) Custom—Munda community—Right of Ghardamad to succeed father-in-law—Hindu law—Marriage.**

According to the custom in the Munda community for a *Ghardamad* to succeed his father-in-law the marriage of the *Ghardamad* need not take place after the death of the son of the father-in-law. The *Ghardamad* who lived with his sonless deceased father-in-law till death and assisted him in his cultivation and other affairs till his death will get all the movable property left by the deceased and such share of the real property if any, as according to the circumstances the *panch* may think it proper to give him, the rest going to the nearest male agnate or agnates. [Para 4]

**(b) Practice—Statement by aborigines—Duty of Courts.**

When dealing with simple aborigines, such as Mundas, so liable to exploitation at the hands of more sophisticated people it is essential for the Courts to be perpetually on their guard to take a commonsense view and to endeavour to penetrate through the statements made before them to the actual realities behind. [Para 5]

*Case referred:—*

1. ('30) 11 P. L. T. 194: 17 A. I. R. 1930 Pat. 278: 9 Pat. 683: 125 I. C. 798, Naika Uraon v. Butna Uraon.

*L. K. Chaudhury*—for Appellant.

*Sarju Prasad and R. K. Sahay*—for Respondents.

**Meredith J.**—This second appeal is by defendant 2 from a judgment of reversal decreeing the suit. This suit was for declaration of title to and recovery of possession over the holding of one Sukra Munda deceased, comprising *khata* NO. 44 of village Jajpur in the Ranchi district of Chota Nagpur. The material facts may be briefly stated as follows. Some time after the death of Sukra Munda, the present appellant Jena Munda brought a proceeding before the Deputy Commissioner under S. 139 (5), Chota Nagpur Tenancy Act, asking to be restored to

possession of Sukra's holding on the ground that he was Sukra's *ghardamad* and as such, in the absence of any surviving son entitled to succeed to the property. He had come into possession after Sukra's death, but had been dispossessed by the landlord who had made settlements of part of the holding with the present plaintiff, brother of Sukra, and the rest with the present defendant 3, on the assumption that Sukra had died heirless. He impleaded, besides the landlord, both the present plaintiff and defendant 3, before the learned Deputy Commissioner. The latter by his order, dated 23-7-1941, held that Jena was a *ghardamad* and entitled to the property, and ordered restoration of possession, which was duly restored on 11-2-1942. The proceedings before the Deputy Commissioner were contested by the landlord, and the Deputy Commissioner observed that Sukra's brother, the present plaintiff, did not appear before him and was taking no interest. Thereafter the present suit was filed, impleaing the landlord as defendant No. 1, Jena as defendant 2, and the other settlement holder as defendant 3. The plaintiff's case was that Jena was not a *ghardamad*, that he (the plaintiff) had taken settlement from the landlord because he was not then aware of the legal position, and that neither the settlement with him nor that with defendant 3, had been effective. The suit was contested only by the present appellant though both the landlord and defendant 3, also filed, written statements.

[2] The learned Munsif held that Jena was not a *ghardamad* or entitled to succeed as such, his main reason being that according to the custom, to become a *ghardamad* a man must be taken into his father-in-law's house for two years as a labourer, and then having proved satisfactory must be married to the daughter, no son being then living, and must be formally adopted as *ghardamad* and give up all claim to his lands in his own village. Even then he would get only such lands as might be allotted to him by the village *panches*. But while the appellant Jena satisfied some of these conditions he did not satisfy all, since it became apparent from the evidence that Jena was taken into the household some 18 years previously when a boy and was married some years later to Sukra's daughter while Sukra had a son Mahadeo still living. This Mahadeo died only 8 or 10 years before the suit. Despite this finding, the Munsif dismissed the suit for defect of parties, holding that the plaintiff should have impleaded two sons of another brother of Sukra's who had died leaving two sons who had gone away to Assam. The learned Additional Judicial Commissioner in appeal agreed with the Munsif's view that Jena had no rights as a *ghardamad*, and, holding that the suit should not fail because the two sons of Sukra's deceased brother had not been impleaded, he decreed it.

[3] Two legal points have been urged before us. First, that S. 258, Chota Nagpur Tenancy Act, was a bar to the suit, as it was not shown that the proceedings before the Deputy Commissioner were vitiated either by fraud or want of jurisdiction. Secondly, that the Judicial Commissioner was wrong in holding that the suit was not bad for defect of parties. For reasons which will presently appear it is unnecessary to pronounce any opinion upon either of these points.

[4] A perusal of the judgments shows that both the Courts below, and particularly the learned Additional Judicial Commissioner, have misdirected themselves upon the position of the *ghardamad* in the Munda community, and have consequently drawn wrong inferences from the evidence and from their own findings of fact. They have confused the Munda customary law with that of the Uraons, an entirely different tribe. Possibly, the learned Additional Judicial Commissioner was misled by the fact that in the plaint the plaintiff is described as an Uraon, but that is clearly a clerical error since it was not disputed that the plaintiff was the own brother of Sukra Munda, and the plaintiff himself in his evidence definitely stated that he was by caste Munda. The learned Additional Judicial Commissioner, following the ruling reported in 11 P. L. T. 194,[1] lays down five conditions for a *ghardamad* to succeed, namely, (1) that the father-in-law was sonless, (2) that the *ghardamad* lived in the house of the father-in-law for two years before his marriage; (3) that he was then married to the daughter; (4) that there should be an intention all along in the minds of the parties that the status should be acquired; and (5) that the *ghardamad* had definitely given up his title to succeed to any property of his natural father. This was a case, however, not on the Munda custom, but on the Uraon custom. Practically the only authority on the Munda customs is Rai Bahadur S. C. Roy's book on the Mundas, and the Courts should therefore have confined themselves to what was laid down in that book and to the evidence. Neither in the book nor in the evidence is any condition specified that the marriage must have taken place after the death of the son. What the Rai Bahadur says is, at p. 433.

> "The *gor jowrea* or *ghar-dijoa* who lived with his sonless deceased father-in-law till the death and assisted him in the cultivation and other affairs till his death, will get all the movable property left by the deceased, and such share of the real property, if any, as according to the circumstances the *panch* may think it proper to give him, the rest going to the nearest male agnate or agnates."

If then we ignore the fact that Jena was married

to the daughter before the death of the son, and not adopted as a *ghardamad* until after the death of the son some years after the marriage, it is apparent that the Courts below have really arrived at the necessary findings in favour of the appellant. Both Courts have found that Jena had definitely given up his title to succeed to any property of his natural father in his own village, and indeed the Record of Rights of his village Tilta shows Jena's brothers had been recorded, but not Jena. They have also found that when Sukra died he was sonless, that Jena was living in the house and looking after the cultivation, and came into possession after Sukra's death. They have also found that he lived in the house as a boy for some years before his marriage, and was then married to the daughter. It is true that the learned Additional Judicial Commissioner also points out that according to Rai Bahadur S. C. Roy the *ghardamad* would get only such property as the *panchas* would allow him, whereas it is known that Jena did not claim any part of the lands as given to him by the *panchas*. That, however, in my opinion, was not a correct statement of Jena's case. Jena's case was that he was a dopted as *ghardamad*, an heir to the *rajha's* lands of Sukra, in the presence of the *panches* and with their approval, which was practically the same thing as saying that the lands had been allotted by the *panches*. The position is so clear upon the evidence that, in my opinion, there is no need to delay matters by a remand for further consideration by the Courts below of the facts in the light of these observations, for that Jena was a *ghardamad* and entitled to succeed was practically admitted. As is apparent from the learned Munsif's judgment, Jena examined a number of witnesses to prove that after the death of Sukra's son Mahadeo, Sukra adopted him as *ghardamad* in the presence of *panches* and with the consent of the plaintiff, and that Jena came into peaceful possession of the suit lands after Sukra's death and was eventually forcibly dispossessed not by the plaintiff but by the landlord. The Courts below were very much impressed by the fact that Jena's marriage procession came from Tilta, but that was natural and inevitable, for he was not adopted as *ghardamad* at the time of his marriage, but only after Mahadeo's death. That c rcumstance if properly understood could not detract in any way from Jena's case. Several witnesses for Jena also deposed that there was a custom amongst the Mundas of the inheritance of rajha's lands (with which we are alone concerned in this case) by a *ghardamad*. The plaintiff's witnesses also made most significant admissions. The plaintiff's first witness admitted that after Sukra's death Jena at first cultivated the suit lands, and previously he used to help Sukra in cultivation in his old age. More significant still, the plaintiff's witness 2 admitted that a *ghardamad* can get the *rajhas* lands if he be adopted with the consent of village *panches*, and he further deposed that after Mahadeo's death Jena not only looked after Sukra's cultivation but even met the marriage expenses of Mahadeo's daughter Chamni.

[5] I will only add one thing. The course of events should have aroused the suspicion in the minds of the Courts below that the plaintiff's opposition to Jena was wholly belated and that he had been merely set up by the landlord after the latter had signally failed against Jena in the proceedings before the Deputy Commissioner. The plaintiff, Dukhan Pahan, made no attempt to oppose Jena in the proceedings before the Deputy Commissioner He set up no case of heirship on his own behalf then. Though he says that he never got notice of those proceedings, he has made no attempt to prove that. The Deputy Commissioner before he observed that Dukhan was taking no interest must surely have satisfied himself that he had received notice. Not only that, but according to Dukhan's own case as set out in the plaint he was content after Sukra's death to take settlement of a portion of the land upon a *salami* of Rs. 200. Had he then regarded himself as the heir entitled to succeed, he would have done nothing of the sort. He says that he was not then aware of the legal position. The legal position being only another way of saying "the custom of his own community" that is, of course, all nonsense. When dealing with these simple aborigines, so liable to exploitation at the hands of more sophisticated people, it is essential for the Courts to be perpetually on their guard to take a commonsense view and to endeavour to penetrate through the statements made before them to the actual realities behind. To have allowed the decision of the learned Additional Judicial Commissioner to stand would have been to work grave injustice to a man who had quite evidently abandoned all his rights to his property in his own village upon the assurance that for services rendered he would succeed to the property of his sonless father-in-law.

[6] I would allow the appeal and dismiss the suit with costs throughout payable to the appellant, Jena Munda.

**Ray J.**—I agree.

D.H. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 12** *[C. N. 5.]*

RAY J.

*Dinabandhu Satpathy and others — Apellants* v. *Gopinath Kar and others — Respdts.*

Appeal No. 18 of 1943, Decided on 21-11-1946, from appellate decree of Sub-Judge, Cuttack, D/9-11-1942.

**Transfer of Property Act (1882), S. 105 — Permanent lease — Plaintiff holding land under defendants who were bajiaftidars since 1889 at unvarying rent — Tenancy devolving from generation to generation with right of sub-letting — In 1906 defendant acknowledging plaintiff's pre-existing rights and since then plaintiff asserting his right as permanent tenant — Held a presumption as to permanent tenancy rights in plaintiff's favour arose even though he was recorded as sikmi raiyat in settlement records and even though land was agricultural — Plaintiff held had acquired permanent tenancy rights by adverse possession since 1906 — Orissa Tenancy Act (2 [II] of 1913), S. 3 (12).**

**The plaintiff brought a suit for declaration that he had acquired permanent sikmi tenancy under the defendants in respect of certain tenancy land The defendants were Baiiaftidars. The plaintiff or their predecessors had been in possession of the disputed lands since 1889 at an unvarying rent in spite of two revenue settlements during the intervening period. The tenancy had devolved from generation to generation with a right of sub-letting. In 1906, the defendants had acknowledged the pre-existing permanent tenancy right of plaintiff in two compromise petitions filed in previous suits and since then the plaintiff had been asserting their right and possession as permanent tenants:**

***Held* that the long possession coupled with uniformity of rent, heritability and transferability of the tenure raised a presumption of permanent tenancy and this presumption was not rebutted by the subsequent settlement records recording the plaintiff as sikmi raiyat. There is nothing in the Orissa Tenancy Act to take away a pre-existing right on account of the fact that a particular permanent tenancy answers the description of a tenancy which has been given certain incidents of a temporary character in the absence of any contract to the contrary. [Para 6]**

***Held further* that the circumstances involving presumption of lost grant of permanent tenancy arising in case of non-agricultural lands was equally applicable to agricultural lands and hence the inference of permanent tenancy could be defeated only if it could be shown that creation of such a tenancy on or before 1889 was against the law or custom. There was no law at the time prohibiting a Bajiaftidar from creating permanent tenancies under him: 27 A. I. R. 1940 P. C. 192, *Rel. on*; *Case law referred.* [Para 12]**

***Held also* that as the plaintiff had been asserting since 1906 his right and possession as permanent tenant he must be taken to have acquired the limited interest of a permanent tenant under defendants by adverse possession or at any rate, abstinence on the part of the landlords to take steps to eject him under the Tenancy Act fortified the presumption of permanence. [Para 13]**

**('45-Com.) T. P. Act, S. 105 N. 44, 49 & 79.**

***Cases referred*:**

**1.** ('25) 52 Cal. 43 : 12 A. I R. 1925 Cal. 309 : 85 I. C. 103, Abdul Hakim Khan v. Elahi Baksha Saha.
**2.** ('40) 27 A. I. R. 1940 P. C. 192 : I. L. R (1940) Kar. P. C. 380 : I. L R. 1941. Bom. 107 : 190 I. C. 342. (P. C.), Shankarrao v. Sambhu Nathu.
**3.** ('78) 3 Cal. 696, Prosunno Coomaree v. Tutton Bepari.
**4.** ('12) 15 C. L J. 220 : 13 I. C. 606, Maharam Chaprasi v. Telamuddin Shah.
**5.** ('82) 8 Cal. 960, Gungadhur Shikdar v. Ayimuddin, Shah.
**6.** (1863-66) 10 M. I. A. 183 : 1 Sar. 558 : 2 Sar. 98 (P.C.), Gopal Lall v. Tilluck Chunder.
**7.** ('66-67) 11 M. I. A. 433 (P. C.), Dhunput v. Gooman Singh.
**8.** ('74) 12 Beng. L. R 229 : 3 Sar. 249 (P. C.), Ram Chunder v. Jogesh Chunder.
**9.** ('67-69) 12 M. I. A. 263 : 2 Beng. L. R. 23 (P. C.), Raja Satyasaran Ghosal v. Mahesh Chandra.
**10.** ('89) 16 I. A. 6 : 16 Cal. 223 : 5 Sar. 275 (P. C.), Secy of State v. Luchmeshwar Singh.
**11.** ('07) 34 I. A. 160 : 34 Cal. 902 (P. C.), Nabakumari v. Behari Lal.

*D. Sahu* — for Appellants.

*B. N. Das*— for Respondents.

**Judgment.** — The appellants brought a suit for declaration that they have acquired permanent sikmi tenancy under defendants 1 to 4 in respect of the suit land measuring 1-20 acres in current settlement records bearing a jama of Rs. 6-3, and that defendants 1 to 4 have got no right to obtain khas possession of the land and the settlement entry of the current settlement record of rights recording that the disputed lands are *khas* dakhali lands of the defendants is erroneous. The defendants resisted the suit alleging that after the death of Natha Satpathy one of the ancestors of the plaintiffs, who held the lands on *bhag*, the plaintiff have got no possession of it either as *bhag* tenants or in any tenancy right.

[2] Both the Courts below have found that the disputed lands have been in possession of the plaintiffs and their predecessors-in-interest for a very very long time, and that it is not the *khas dakhali* land of the defendants.

[3] The learned trial Court found that the plaintiffs had a permanent tenancy right as sikmi tenants. The learned lower appellate Court reversed that part of his finding and held that the plaintiffs were mere sikmi tenants without any right of permanency. Both the Courts below also differed as to their interpretation of Exts. 1 and 2 which are two compromise petitions filed between the parties or their predecessors-in-interest in some previous suits in which there are recitals with regard to the nature of tenancy right of the plaintiffs. The trial Court held that the recitals amounted to a mere acknowledgement of a pre-existing permanent right, while the learned Subordinate Judge in appeal took the view that the recitals amounted to creating a permanent right, and, as they were not registered documents, they cannot be taken in evidence in proof of the plaintiffs' permanent tenancy right.

[4] I have perused Exts. 1 and 2 and they leave no doubt in my mind that the recitals in them are mere acknowledgments of a previously existing permanent tenancy. One of the documents says that the plaintiffs (meaning the present plaintiffs) should continue in possession as before, that is to say, under terms and conditions pre-existing, and then the subsequent sentences following the above are to the effect that the defendants would not dispossess the plaintiffs or their heirs.

[5] From the revisional settlement records it appears that the plaintiffs have been noted to have been in possession since 1889 at an unvarying rate of Rs. 6-3.

[6] The facts found come to this that the plaintiffs have been in possession of the disputed lands since 1889 as tenants. The tenancy has devolved from generation to generation and bears an unvarying rent. These lands undoubtedly lie within the ambits of temporarily settled tracts, and there have been two land revenue settlements since the inception of the tenancy. If it were not a permanent tenancy with fixed rent, the rent could have been enhanced according to the wishes of the landlords, namely, the defendants. This long possession coupled with uniformity of rent and heritability, and also, as it appears from the record of rights, the right of sub-letting which means transferability raise a presumption of permanency. As against that, the only argument that is urged by Mr. B. N. Das is that once a tenancy is shown in the settlement papers to be a sikmi tenancy, no permanency can be attached thereto in view of the provisions of the successive Tenancy Acts according to which an under-raiyat is nothing but a tenant-at-will liable to be evicted on notice to quit. This is an argument which I cannot accede to. In assessing the value of this submission, it has to be borne in mind that the defendants' tenure is one of a Bajiaftidar. Their predecessors once claimed to be revenue-free proprietors but on account of absence of sovereignty in the grantor, their reveue-free character was confiscated and they were assessed with light rents. My point in tracing this origin is that Bajiaftidars are not raiyats within the definition assigned to the word in the successive Tenancy Acts. For convenience sake, they have been classified as raiyats for certain purposes. Accordingly their under-tenants have been nomenclatured as under-raiyats. There is nothing in the tenancy Act declaring that any pre-existing right should be taken to have been deprecated (*sic* depreciated) on account of the tenancy being classed as a sikmi tenancy. In view of the provisions of the Orissa Tenancy Act, occupancy right of an under-raiyat is not inconsistent with its provisions I do not think that the presumption of permanency has at all been rebutted by the subsequent settlement records recording the tenants as sikmi raiyats. This was due to the classification recognised in the Tenancy Act. There is nothing in the Tenancy Act to take away a pre-existing right on account of the fact that a particular permanent tenancy answers the description of a tenancy in the Tenancy Act which has been given certain incidents of a temporary character in the absence of any contract to the contrary.

[7] Swami B. N. Das, the learned counsel for the responents in support of his submission that the circumstances involving presumption of lost grant of permanent tenancy do not apply to agricultural lands but only to non-agricultural ones, cited the following authorities:-52 Cal. 43,[1] A. I R. 1940 P. C. 192,[2] 3 Cal. 696,[3] 15 C. L. J. 220[4] and 8 Cal. 960.[5]

[8] The case in 52 Cal. 43[1] is a case relating to non-agricultural (bastee) lands and the decision turned upon the nature of the tenancy at its origin which was known and it was held that mere absence of written lease would not improve the position. But in the text of the judgment, four decisions of the Privy Council, namely, 10 M. I. A. 183[6] at p. 191,11 M. I. A. 433,[7] 12 Beng. L. R. 229[8] and 12 M I. A. 263[9] have been referred to as authorities enunciating grant of permanency to ancient agricultural tenancies of unknown origin. The case in A. I. R. 1940 P. C. 192[2] is a direct authority in which tenancies of arable lands of which the origin had been lost in antiquity, were inferred to be permanent from circumstances, such as, heritabilty, transferability, smallness of rent and other circumstances of similar nature. The following paragraph, quoted from the decision, indicates that tenancies for agricultural purposes do not compare unfavourably in the matter of inference of permanency from the presence of circumstances such as above. The paragraph reads:

> "Their Lordships would not willingly cast doubt upon the principle that the fact that a tenancy is for agricultural purposes does not prima facie indicate that it is permanent or indeed that it is more than an annual tenancy. The inference of permanence is an inference which it is difficult to make and which requires the presence of circumstances explicable when taken as a whole only on the hypothesis of permanence. A full exposition of the principles upon which such inference is to be made or rejected has been given by the Board in previous cases and need not here be repeated : 16 I. A. 6[10] and 34 I. A. 160.[11] Their Lordships agree with the High Court in thinking that the inference in the present case is fully warranted."

[9] The case in 3 Cal. 696[3] is not applicable to the present case. There the tenancy was at the beginning a holding-at-will and the holder had built a dwelling house at a very trifling expense. And it was held that there is no law in the country which converts a holding-at-will into a permanent tenancy merely because the tenant without any arrangement with his landlord chooses to build a dwelling house upon it.

[10] In 15 C. L. J. 220[4] the circumstances, whose presence will lead to an inference that the tenancy was in its inception permanent, have been enumerated and elaborately discussed. It is in this case that the four Privy Council decisions, already referred to, have been relied upon as authorities though the case deals with a land let

out for residential purposes, while the Privy Council cases dealt with agricultural tenancies.

[11] The case in 8 Cal. 961[5] does not assist the respondent. The case is no authority for the proposition that circumstances of antiquity, heritability, transferability and the like will not lead to an inference of permanency in the case of agricultural tenancies.

[12] As it is a matter of presumption, such an inference could be defeated only if it could be shown that creation of such a tenancy on or before 1889 was against law or custom. There was no law at the time prohibiting a Bajiaftidar from creating permanent tenancies under him.

[13] At any rate, it is clear that since the date of Exts. 1 and 2, namely, 1906, the plaintiffs have been asserting their right and possession as permanent tenants, and they must be taken to have acquired the limited interest of a permanent tenant under the defendants by adverse possession, or, at any rate, abstinence on the part of the landlords to take steps to eject them under the Tenancy Act fortifies the presumption of permanence.

[14] Therefore, looked from whichever standpoint, there is no answer to the plaintiffs' claim of a permanent sikmi tenancy. They are, therefore, entitled to the declaration prayed for. Under the circumstances, I allow the appeal, set aside the judgment of the lower appellate Court and restore that of the trial Court. Under the circumstances of this case, I make no order as to costs of the second appeal.

K.S. *Appeal allowed.*

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## A. I. R. (35) 1948 Patna 15 *[C. N. 6.]*

REUBEN J.

*Raghubans Das—Petitioner* v. *Emperor.*

Criminal Revn. No. 598 of 1946, Decided on 28-11-1946, from order of S. D. O., Hajipur, D/-25-4-1946.

**Criminal P. C. (1898), S. 133—Proceedings under—Order staying proceedings till decision of Civil Court—Magistrate has no jurisdiction to reopen matter on fresh application—Cr. P. C., S. 139A.**

**Where in a proceeding under S. 133, a Magistrate passes a competent order under S. 139A (2) staying the proceeding until the parties get the matter decided by a civil Court, the Magistrate has no jurisdiction to reopen the matter on a fresh application in respect of the same matter to draw up fresh proceedings under S. 133 on the principle that it is for the interest of the State that there should be an end to litigation: 18 A. I. R. 1931 Cal. 2, *Disting.* [Para 3]**

**('46 Com.) Cr. P. C., S. 133 N. 30 pt. 3 and S. 139A N. 7 and 8**

*Cases referred* :—

1. **('31) 18 A. I. R. 1931 Cal. 2 : 128 I. C. 810, Satish Chandra v. Krishna Kumar.**
2. **('30) 34 C. W. N. 959 : 18 A. I. R. 1931 Cal. 357 : 128 I. C. 816, Kalu Mian v. Emperor.**

*G. P. Das and Shambhunath*—for Petitioner.

*K. P. Varma for Government Advocate and Satendra N. Sinha*—for the Crown.

**Order.**— This is a petition in revision for the quashing of proceedings under S. 133, Criminal P. C. which are pending in the Court of the Sub-Divisional Magistrate of Hajipur.

[2] The proceedings relate to survey plot No. 3459 in mauza Balgaon Chandpura Buzrug. The plot is described in the proceeding as a public path, and the petitioner has been directed to remove certain encroachments therefrom said to have been made by digging pits in the land. It is urged that the proceeding is bad *ab initio* for for want of jurisdiction, on the ground that a previous proceeding for the same purpose and relating to the same plot was stayed by an order udder S. 139A, Criminal P. C.

[3] The order under S. 139A was passed on the 8-11-1944, by the predecessor-in-office of the present Sub-Divisional Magistrate. It notes that the land in question has been recorded in the settlement khatian as uncultivated land forming the *mafi brit* of the petitioner, and that there is nothing to conclude that any portion of it is used as a road. After referring to the khatian, the Sub-Divisional Magistrate concluded:

"Thus it shows that opposite party has *prima facie* claim over this plot as his uncultivated land, may it be used by him as a road or like that, and such no further steps should be taken in the proceeding till it be decided by civil Court as required by S. 139A (2)".

This was a perfectly competent order the provisions of S. 139A, sub-s. (2), and properly referred the parties to get the matter decided by the civil Court. In spite of this, on the 7-1-1945, the opposite party Saukhi Lal Rai, applied again for proceedings under S. 133 in respect of this plot. This application was rejected by the then Sub-Divisional Magistrate who regarded it as being "an out come of old enmity." The matter has now again been re-agitated and this time the objection of the petitioner, denying the existence of public rights, has been rejected by the learned Sub-Divisional Magistrate on the ground that the evidence adduced by him merely shows that the land belongs to him; but this does not exclude the possibility of the land, nevertheless, being used as a road. It appears to me that, on the principle that it is for the interests of the State that there should be an end of litigation, the Sub-Divisional Magistrate had no jurisdiction to re-open the matter which had already been referred to the civil Courts by a competent order under the Code. The case in A. I. R. 1931 Cal. 2[1] has been cited as an authority that an order under S. 139A, sub-s.(2) does not exclude the jurisdiction of the Magistrate to draw fresh proceedings under S. 133 on proper materials. The facts of that case are somewhat difficult to ascertain from the judgment. A rule was directed against an order of a Deputy Magistrate passed

under S. 139A, Criminal P. C. staying proceedings under S. 133 It was issued on two grounds first, that the Magistrate was wrong in disposing of the case without examining the witnesses produced by the petitioner, and secondly, that, in view of the procedure followed by the Magistrate, a final order under S. 137 ought to have been passed on 25-5-1929. On the first ground their Lordships held that the procedure followed by the Magistrate was in accordance with the law. In dealing with the second ground, their Lordships mention that an application was made to the Magistrate in January 1929, on which the Magistrate asked the second party to show cause. On this, the second party filed a written statement, but failed to file papers which the Magistrate thereupon called for. The Magistrate then ordered a local enquiry by the police, and, the on receipt of the police report, drew up proceedings under S. 133. It was contended on these facts that the Magistrate had no right to draw two proceedings; but their Lordships rejected the contention, holding that their was nothing in the law to prevent the Magistrate from drawing up fresh proceedings based on proper materials. The same case is reported in 34 C. W. N. 959[2] which report gives us the date of the order under revision as the 25-6 1929, that is, subsequent to the date on which, according to the second contention, the proceeding under S. 133 should have been disposed of by a final order under S. 137. It seems clear from this that the second proceeding, with which their Lordships were concerned, was drawn up before the order under S. 139A. That this was the case would also appear from the remarks of their Lordships towards the end of the judgment: "then, again, the order of the Magistrate staying proceedings may relate to any one or both the proceedings." As I have said, the rule was directed against an order staying proceedings started under S. 133; apparently, the order had been treated as applying to both the proceedings under S. 133.

[4] On the above grounds, I would allow the petition, and quash the proceedings under S. 133.

K.S. *Revision allowed.*

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## A. I. R. (35) 1948 Patna 16 *[C. N. 7.]*

RAY J.

*Chintamani Parida and others* — *Appellants* v. *Brajasundar Das* — *Respondent.*

Appeal No. 190 of 1942, Decided on 18-10-1946, from appellate decree of Dist. Judge, Cuttack, D/- 13-8-1942.

**Orissa Tenancy Act (2 [II] of 1913), S. 236 (1) — Applicability — Raiyat holding homestead with lands held as under-raiyat.**

Section 236 will operate the moment it is found that the homestead is the *raiyat's* homestead and is not a part of his *raiyati* holding even though the homestead might be held as part of any other holding. The operation of the section cannot be limited to a homestead constituting a holding by itself. Thus the section will apply when the homestead is held as part of other lands held as under-raiyat: 23 A.I.R. 1936 Cal. 565, *Rel. on*; 13 A.I.R. 1926 Cal. 662, *Disting.*; 14 A.I.R. 1927 Cal. 191, *Not foll.* [Paras 3 and 6]

*Cases referred:*—

1. ('36) 23 A. I. R. 1936 Cal. 565: 163 I. C. 406, Pulin Chandra Daw v. Abu Bakhar Naskar.
2. ('27) 14 A. I. R. 1927 Cal. 191 : 99 I. C. 216, Chandra Mohan v. Meherjan Banu.
3. ('26) 13 A. I. R. 1926 Cal. 662 : 94 I. C. 920. Rahimuddin Miaji v. Amina Bibi.
4. ('15) 21 C. L. J. 475 : 3 A. I. R. 1916 Cal. 32 : 28 I. C. 839, Krishna Kanta Ghose v. Jadu Kasya.

*S. N. Sen Gupta and S. N. Das Gupta* — for Appellants.

*L. K. Das Gupta* — for Respondent.

**Judgment.**— This second appeal is directed against a decree passed by the District Judge confirming that of the trial Court and giving the plaintiff a decree of ejectment from the disputed lands. They consist of several plots of which plot NO. 1360 with an area of '409 of an acre and NO. 1361 with an area of '068 of an acre are admittedly homestead. The rest of the disputed lands except with regard to one which contains a tank (a very small tank) are admitted to be arable lands. There is nothing on record to enable me to hold that the tank is a part of the homestead. In this judgment I will consider it as a part of the arable lands too. As the defendants were recorded as under-raiyats in respect of all the disputed lands forming one holding, the plaintiff landlord wanted to eject them after due notice to quit under the provisions of the Orissa Tenancy Act, S. 57. There is no controversy as to the sufficiency or the validity of the notice to quit.

[2] The only point that is contested is that the defendants must have an occupancy right in the homestead portion of the holding in view of the provision of S. 236, Orissa Tenancy Act. It is sub-s. (1) of the section which calls for an interpretation in this appeal. The sub-section runs as follows:

"When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by the local custom or usage and subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

[3] The learned District Judge has taken the view that this section, as it stands, will operate against a homestead which constitutes a holding by itself. The moment it is found that the homestead is a holding along with certain other lands as an under-raiyati holding or as any other holding governable by the provisions of the Orissa Tenancy Act, S. 236 will have no operation. It is quite obvious that he has, in coming to this conclu-

sion, been influenced by the history of the enactment of S. 236, and of its predecessor S. 182, Bengal Tenancy Act. No doubt if you allow the language of a statute to be either extended or narrowed down with reference to the history of the legislation, such a contention can be maintained, but otherwise not. Section 236, subs. (1) opens with the following words "when a raiyat holds his homestead otherwise than as part of his holding as a raiyat." These words are clear and explicit enough to say that the section will operate the moment it is found that the homestead is the raiyat's homestead and is not a part of his raiyati holding even though the homestead might be held as part of any other holding except that of his raiyati holding. It will come within the words "held otherwise than as part of his holding as a raiyat." In the absence of any words in the section or in its context limiting the operation of these words, I am unwilling to hold that S. 236 will be inapplicable in the present case.

[4] The object of the legislation will be completely defeated if such a limited view is taken of the very wide words employed by the legislature. Mr. Das Gupta for the respondent has in support of his (lower appellate Court's) view relied upon two decisions of the Calcutta High Court, one of which is A. I. R. 1936 Cal. 565.[1] So far as 1936 Calcutta is concerned, it does not at all support his contention. This case rather strengthens my view, inasmuch as, it says that the requirements of S. 182, Bengal Tenancy Act are (1) that the tenant of the homestead is a raiyat, (2) that he holds the homestead otherwise than as a part of his holding :

"Both the elements are present in this case. Dr. Basak, however, contends that in order to determine the incidents of the defendant's tenancy of the homestead the Court has to look to the contract which created the tenancy and it is not permissible to take into consideration any subsequent events which the landlords did not contemplate at the time when the tenancy was created and over which they had no control. Is is difficult to accept this contention in view of the *general terms of the provisions of S. 182.* The word "holds" in the section seems to point to the time when the dispute about the incidents of the tenancy of the homestead arises."

[5] In my judgment these observations of the learned Judges of the Calcutta High Court support the view that I propose to take. The other decisions of the same Court to which my attention has been invited by the learned counsel for the appellants are A. I. R. 1927 Cal. 191[2] and A. I. R. 1926 Cal. 662.[3] These two decisions proceed on the basis that S. 182, Bengal Tenancy Act applies to those cases of homestead to whom (?) the Transfer of Property Act once applied and not to those which are already governed by the provisions of the Bengal Tenancy Act. Their Lordships of the Calcutta High Court who delivered the judgment in A. I. R. 1936 Cal. 565[1] observed that you have to look to the time when the dispute arose but not to the history of the tenancy as to how it originated and under what law it was created.

[6] So far as A. I. R. 1927 Cal. 191[2] is concerned, it distinguishes the case in 21 C. L. J. 475[4] wrongly, in observing that in the latter, the holder of the homestead lands was not a raiyat. The case in A. I. R. 1926 Cal. 662[3] proceeds upon the basis that the homestead land and the other lands of the under-raiyati holding were leased out by one registered lease. That at any rate distinguishes that case from the present. But I am not inclined to accept any view which is to the effect that when the homestead lands of a raiyat are held as a part and parcel of other arable lands, also held by him as under-raiyat they do not come within the category of "homesteads held otherwise than as part of his holding as a raiyat." I do not think it will be a fair interpretation of the section to hold that it applies to those cases only where tenancy of the homestead was previously governed by the Transfer of Property Act. Strictly speaking, when a raiyat lets out some homestead land, the lease is governed by the Transfer of Property Act. If the parties call the lessee's interest to be under-raiyati interest that does not detract from the real character of the lease-hold interest, nor can the record of rights recording such lands along with other lands as part of one under-raiyati holding alter the character thereof. The Transfer of Property Act applies or not according as the lands dealt with are either agricultural lands or not. So as all leases of homestead lands ought to be governed by Transfer of Property Act, there is no point in treating some cases differently because they have been wrongly considered as governed by Tenancy Act in preparing Record of Rights wherein they have been amalgamated into one holding with other lands.

[7] In the result, I am of opinion that the defendants are protected from ejectment, in respect of the aforesaid two plots which constitute their homestead, though being raiyat's homestead within the meaning of S. 236 and the incidents of their tenancy in respect thereof are that of a raiyat which means that they have acquired a right of occupancy in those lands. The decree of the learned Courts below should therefore stand with regard to other lands in dispute but should be set aside with regard to aforesaid two plot numbers constituting defendant' homestead. In view of the partial success of both the parties in this Court, I make no order as to costs.

D.H. *Appeal partly allowed.*

## A. I. R (35) 1948 Patna 18 *[C. N. 8.]*

SHEARER AND REUBEN JJ.

*Basanta Kumar Mitra* — *Appellant* v. *Chota Nagpur Banking Association, Ltd.* — *Respondent.*

Appeal No. 19 of 1943, Decided on 11-3-1947, from original decree of Sub-Judge, Dhanbad, D/- 12-10-1942.

**(a) Deed — Construction — Mortgage deed to secure floating balance of account.**

One *A* had a current account with a bank. He was allowed to overdraw according to his needs. In 1928 the amount of the overdraft stood at Rs. 15,000. *A* executed a mortgage deed in favour of the bank to secure the overdraft. One of the terms of the deed was as follows, "The amount of my debt shall at no time exeed Rs. 15,000. I shall not take the said amount in one lump. I shall take the loan of the said amount in instalments according to my needs." *A* covenanted to repay by the end of December 1931:

*Held* that the bond was executed as a security for a floating balance of account and not as a security for an existing liability of Rs. 15,000: (1859) 53 E R. 1025, *Disting.* [Para 6]

*Held further* that the security was limited to Rs. 15,000 and did not cover the entire loan granted by the bank. [Para 8]

**(b) Limitation Act (1908), Art. 85 — Mutual account — Test to determine.**

The fact that there were oscillating balances in favour of the two parties is not decisive in determining whether the account is a mutual account. The test is, not that there must be a shifting balance, but that such was a possible and likely incident of mutual transactions in regard to which the account was kept. Hence where a person, initially a depositor in a bank, has by steady overdrawing become a debtor to the bank, the account cannot be said to be mutual simply because on some occasions there were credit balances in favour of that person. Art. 85 has no application to such a case: 9 A. I. R. 1922 Pat. 364; 18 A. I. R. 1931 Cal. 359 and 11 A. I. R. 1924 Pat 107, *Ref.* [Paras 12, 13 and 14]

('42-Com.) Lim. Act, Art. 85, N. 3.

**(c) Limitation Act (1908), Art. 57 — Current account overdrawn by customer of bank — Each overdraft is independent loan — Payment by customer — Effect.**

When the customer of a bank draws a cheque on it, knowing that the funds at his credit are insufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or a loan Each such transaction is an independent loan, limitation for the recovery of which is determined by Art. 57 of the Schedule to the Limitation Act. Regarded in this light, each payment made by the customer over his signature goes to extend limitation in regard to the particular overdraft which it goes to repay and which would be the earliest item outstanding on the debit side. The payment would therefore be of no avail to save limitation in respect of the general balance of account. The fact that in such a case part of the floating balance was secured would not make a difference in this respect: 29 A I.R. 1942 Pat. 201, *Rel. on.* [Para 15]

('42-Com.) Lim. Act, Art. 57, N 7.

**(d) Banker and customer — Mortgage by customer to secure floating balance of account to certain limit — Payment by customer — Presumption as to appropriation by bank.**

Where a customer has executed a mortgage to secure floating balance of account to certain limit and there is overdrawing above this limit, and repayments are made by the customer, the ordinary rule that each repayment goes in discharge of earliest item outstanding on the debit side does not apply. In such a case a modified rule would apply and the presumed intention should be to apply the payments in discharge of unsecured items in order of date in priority to the secured items. [Para 17]

**(e) Civil P. C. (1908), O. 20, R. 11 — Applicability — Mortgage decree.**

Order 20, Rule 11 applies to a money decree and not to a mortgage decree. Hence in the case of a mortgage decree the decretal amount cannot be made payable in instalments under O. 20, R. 11. [Para 24]

*Cases referred:—*

1. (1859) 53 E.R. 1025, In re, Medewe's Trust.
2. (1870) 10 E. Q. 467: 39 L. J. Ch. 655, In re, Boys; Eedes v. Boys.
3. ('22) 9 A. I. R. 1922 Pat. 364 : 66 I. C. 30, Gopal Rai v. Harichand Ram Anant Ram.
4. ('31) 58 Cal. 649 : 18 A. 1. R. 1931 Cal. 359 : 133 I. C. 801, Tea Financing Syndicate Ltd. v. Chandra Kamal.
5. ('23) 4 P. L. T. 571 : 11 A I. R. 1924 Pat. 107 : 74 I. C 831, Fyzabad Bank v. Ramdayal.
6. ('42) 29 A I. R. 1942 Pat 201 : 197 I. C. 449, Uma Shanker v. Bank of Bihar Ltd.
7. (1816) 1 Mer. 572, Clayton's Case.
8. (1910) 1 Ch. 648 : 79 L. J. Ch. 561: 102 L. T. 556, Deeley v. Lloyds Bank.
9. ('43) 30 A. I. R. 1943 Pat. 301 : 22 Pat. 213 : 209 I. C. 88, Chota Nagpur Banking Association Ltd. Purubia v. Lal Mohan.
10. (1865) 9 H. L. C. 514 : 34 L. J. Ch. 468 : 5 L. T. 90 : 9 W R. 900, Hopkinson v. Rolt.
11. (38) I.L.R. (1938) 2 Cal. 72 : 25 A. I. R. 1938 P.C. 67 : 32 S L. R. 374 :65 I. A. 66 : 173 I. C 15 (P.C.), B.N. Rly. Co., Ltd. v. Ruttanji Ramji.

*Mahabir Prasad, Nitai Chandra Ghosh and Sudhir Chandra Ghosh* — for Appellant.

*B. C. De* — For Respondent.

**Reuben J.**— This appeal by the defendant arises out of a suit brought by the respondent bank to enforce two mortgage deeds executed in its favour by the appellant. One of these deeds was executed on 5-11-1928, to secure a sum of Rs. 15,000 to be repaid by the end of December, 1931, and hypothecating a two-storied building and land measuring three bighas standing in Dhanbad Municipality and described in Sch. A on the plaint. The second bond was executed on 28-4-1933, to secure a sum of Rs 20,000 and hypothecating in addition to the house and land already mentioned another plot of land in Hirpur Mouza measuring about one bigha, also situated in Dhanbad Municipality. The loan secured by this bond was repayable by the end of December, 1934. The Bank sued to recover under the earlier bond the sum of Rs. 33,485-13-1 and, under the later bond, the sum of Rs. 20,600-14-2 and asked for a preliminary mortgage decree with liberty to apply for a personal decree in the event of the plaintiff's dues not being fully realised by the execution of the mortgage decree. The defendant-appellant denied liability under both the bonds. As regards the first bond,

he pleaded that, under its terms, the liability could not, in any event, exceed Rs. 15,000 with interest, and that the bond had been satisfied by payments made by him from time to time to the Bank. With regard to the second bond, he denied the passing of the consideration alleged. There were also defences relating to the rate of interest payable and raising the plea of limitation. The learned Subordinate Judge held that, under the first bond, the plaintiff was entitled to recover only Rs. 15,000 inclusive of interest, and that all items of overdrawal of the defendant's account with the Bank exceeding this amount were barred by limitation. With regard to the second bond, the Subordinate Judge allowed the claim of the Bank in full. On these findings, he gave the Bank a preliminary mortgage decree with interest at six per cent per annum till the date of realisation. Hence the present appeal. A cross-objection has been filed by the Bank.

[2] The suit arises out of transactions which the appellant had with the branch of the Bank at Dhanbad where, from at least the year 1922, he has had a current account. I may note that the defendant, who is a practising lawyer, was a local director of the Bank at Dhanbad from its inception in the year 1919 till the beginning of the year 1941. He was also one of the legal advisers of the Bank. From the beginning, he seems to have been allowed to overdraw according to his needs, and the account was a fluctuating one the outstanding balance being sometimes in his favour and sometimes against him. This state of things continued till the end of July, 1927, after which the account remained steadily overdrawn till the execution of the first bond, the amount of the overdraft varying between Rs. 9000 to Rs. 15,000. On the date, when the first bond was executed, the overdraft stood at Rs. 15025-2-9. The bond was executed to secure the overdraft, and the defendant covenanted therein to repay by the end of December, 1931. Transactions between the defendant and the Bank continued as before, and the account remained overdrawn with a fluctuating over-draft very seldom below Rs. 15,000 and for a considerable period, very much exceeding this limit. By January, 1931, it had swelled to nearly 30,000. On 21-8-1931, the overdraft, which stood at R 28,068, -2-9 was wiped out by a cash deposit of Rs. 35,005-11-3 and, for the first time since July 1927, there was a balance of the account in favour of the defendant. The defendant made a further deposit of Rs. 270 on 22nd August but, by the 25th, the account was again overdrawn to the extent of Rs. 12,742-7-6. The overdraft rose rapidly and by the end of year, it stood at Rs. 27,149-9-3. Throughout the year 1932, and the early portion of 1933, the account was in deficit against the defendant, the balance due varying from about Rs. 25,000 to Rs. 32,000. When the second bond was executed on the 28-4-1933, the balance due was Rs. 31,468-9-9. This bond, unlike the former bond, was executed to secure a definite loan of Rs. 20,000. The loan was admittedly not paid in cash but appears in the overdrawn current account by a credit made in favour of the defendant on 16-8-1933, by which date the overdraft stood at Rs. 36,173-11-3 and was thus reduced to Rs. 16,173-11-3 Hereafter, the account continued in deficit as before with a fluctuating balance which, when the account was closed at the end of January, 1940, stood at Rs. 33,485-13-1. The last deposit in cash was one of Rs. 156-11-6 made on 5-8-1937. The last deposit seems to be on 19-12-1938, by a cheque for Rs. 1200. A further entry of a cheque deposit appears on 12-8-1939, but, from the corresponding entry in the withdrawal column, this would appear to be merely an instance of a cheque presented by the defendant to the Bank for encashment. The entries subsequent to this date are all of interest on the outstanding amount.

[3] The first point urged by the learned Advocate General appearing for the appellant is that the bond of 1928 was executed as security for an existing liability of Rs 15,000 and not-for a floating balance of account, and in consequence was paid off on 21-8-1931, when the balance of the account stood in favour of the defendant. The bond is Ex. 1 at page 20 of the paper book. It recites that the defendant has been carrying on business from before with the bank by taking loans from its branch at Dhanbad, and that the bank has asked him to execute a simple mortgage bond "in respect of your dues from me"; and, therefore, he executes this bond and agrees to the terms specified. It then proceeds to set out the terms. The very first of them is:

"The amount of my debt shall at no time exceed Rs. 15,000, rupees fifteen thousand. I shall not take the said amount in one lump. I shall take loan of the said amount in instalments according to (my) need. But the amount of my taking loan in the aforesaid. . . . . manner shall at no time be in excess of Rs. 15,000 (rupees fifteen thousand) inclusive of interest"

[4] I have noted above that at that time there was already an out-standing overdraft of over Rs. 15,000. If the intention was merely to secure this amount, there would have been no need for the provision about taking loans in instalments and not in one lump. Then the bond goes on:

"Whenever and whatsoever amount I shall take shall receive the same by giving you a cheque. . . . . ."

This provision is one which clearly contemplates future loans to be taken by the defendant. As there was already an existing liability of over Rs. 15,000 the question of taking fresh loans under the contract would not have arisen unless, on part payment of the existing liability, further loans on the security of the mortgage were permissible.

[5] In support of his contention the Advocate General referred us to (1859) 53 E. R. 1025.[1] In that case, Medewe executed a deed poll in favour of his bankers, with whom he had three accounts, charging his estate with the payment "of the three serveral sums of money which shall or may be found due on the balance of the said several accounts." When the deed poll was executed the balances then due under those accounts were uncertain, and the future tense used in the instrument was held to relate to this uncertainty, and not to the uncertainty always attaching to the amount of a floating balance of account. Further, in a bond executed at the same time as the deed poll, to which bond Medewe and the bankers were parties, an express term was included covering a floating balance, "all such sum or sums of money as now are or which shall from time to time be or become due and owing." The Master of the Rolls took this fact into account in holding that the deed poll was only for the then existing balances of the three accounts. That case is entirely distinquishable from the case before us.

[6] The Advocate-General further argues that the fixing of a time limit up to the end of December 1931, is inconsistent with the bond being for a floating balance of account. This contention is based on (1870) 10 Eq. 467.[2] There the instrument in question was a promissory note executed by Boys for £500 payable eight months from date, and containing no express reference to the account. Hence, an inference had to be drawn from the circumstances, as to whether it was intended as security for advances then made or to be made or for floating balance of account. In coming to the conclusion in favour of the former alternative, the Master of the Rolls pointed out that the promissory note was payable on a fixed date, and not when the account was closed or when the bank thought fit to say that it would not advance any more money. The Master of the Rolls, however, attached greater weight to another circumstances, namely that, on the day that the promissory note was executed and six days later, by two payments, the bank advanced the exact sum of £500 to Boys. Here there is nothing in the date fixed for the repayment of the advance which is inconsistent with the security being for the day to day balance, and on the terms of the mortgage bond it is clear to me that it is intended to be a security of this kind.

[7] Finally, the Advocate-General argues that in the second bond the first bond is described as a bond for a fixed amount," for (repayment) of Rs. 15,000 due to you by me in respect of the said overdraft account." Conceding, for the sake of argument, that these words are admissible for the purpose of interpreting the first bond, it seems to me that they are merely a loose description of the purpose of the first bond and are not inconsisent with its being for the floating balance of the account. On the other hand, from the conduct of the parties it would appear that they regarded the first bond as still effective security for Rs. 15,000 for, if the bond was intended as security for the existing debt, it was satisfied on 21-8-1931, and should not have remained with the bank. Also as the total debt of the defendant on the date of the execution of the second bond was more than Rs. 30,000, the second bond for Rs. 20,000 would have been inadequate security. Evidently, the parties thought that the first bond was still good security for a part of the debt. This seems to be the manner in which the defendant regarded the bond even at the time of filing the written statement. I say this because, in the written statement, I do not find any suggestion that the bond was for an existing debt, and it is not alleged that the bond was discharged debt and it is not alleged that the bond was discharged by the lump payment of 21-8-1931, but on the contrary that it was satisfied by "payments made from time to time."

[8] The next question which arises is the extent and the period for which plaintiff bank can avail itself of the security under the first bond. Mr. De for the bank contends that the limit of Rs. 15,000 is only a limit in favour of the bank, entitling it to refuse to grant advances beyond this limit, and that the security covers the entire loan granted by the bank. On the terms of the bond I find myself unable to take this view. It is true that the bond recites at the beginning that the bank wanted security in respect of "Your dues from me", an expression which may cover the entire loan granted, but this is merely the reason stated for the execution of the loan. The operative portion of the bond is contained in the numbered "terms and conditions." The very first clause provides:

> "The amount of my debt shall at no time exceed Rs. 15,000 rupees fifteen thousand. . . But the amount of my taking loan in the aforsaid manner shall at no time be in excess of Rs. 15,000 (rupees fifteen thousand) inclusive of interest."

Clause 6 then provides:

> "Three years' time, that is till December 1931, is fixed for the repayment of the amount. If the entire

amount is not repaid, that at any time after the expiry of the said period of time, you shall be competent to institute a suit for the realisation of your entire principal amount together with interest (thereon) on account of this Sthitabadha mortgage bond, and you shall be competent to realise your money according to the stipulations made in para. 5 of this deed."

I cannot read these provisions as intended only for the protection of the bank. The intention of the parties seems rather to have been that the defendant should reduce his indebtedness, that his total indebtedness should be confined to Rs. 15,000 and that he should clear off his debts within the time specified. The drafting may be inartistic but the meaning is plain, namely that the security was being given for an indebtedness of Rs. 15,000 which limit was also to include the interest on the money lent.

[9] In view of the terms of the bond limiting the transactions to the end of December 1931, I am unable to hold that it authorised loans by the bank after that date, and that such loans are secured by it. This seems to have been the view which the bank itself held at that time, because we find from the accounts that from the beginning of 1932 the bank adopted a new mode of charging interest. Throughout the period of the bond interest on the outstanding loans for the past year is brought into the account and debited as principal at the beginning of the next year. This is in accordance with the bond, which provides

"2 ..... The amount of interest will be treated as principal, should it fall due at the end of the year and the interest on the same will accrue at the following rate.

* * * *

4 ..... I shall pay interest at the rate of 12 annas (annas twelve) per hundred per month from the the date I shall take the amount. You shall be competent to debit the amount of interest for every month to my account on the first of the next month."

From February, 1932, however, the interest due for one month is brought into account at the beginning of the next month, i. e. it is compounded monthly, a practice which was followed before the execution of the bond. It is the common practice that interest is charged at a higher rate on unsecured than on secured loans.

[10] Through a mistake, it is alleged in the plaint that under this bond interest is payable at twelve annas per hundred rupees compoundable with monthly rests. There is a clear provision in the bond for bringing the interest into the principal only at the end of every year and this was the practice followed by the bank throughout the period of the bond. There is a further point regarding interest. I have held above that the maximum amount secured by the bond was Rs. 15,000 inclusive of interest. Is this also the case after the due date of payment? In other words, is the bank entitled to interest after December, 1931, and is it subject to the limit of Rs. 15,000 ? I would answer this question in the favour of the bank. The relevant provision is clause 6 of the bond which is set out above. This entitles the bank to interest on the entire principal due at the expiry of the above period. This amount is correctly described as "principal", because under the provisions of clause 2 cited above such interest as might have remained due at the end of December 1931, would be carried into the principal. The provision regarding the realisation of interest on the amount due after the stipulated period is not limited as regards the amount. Various dates have been suggested to us as the dates from which this interest should run. The proper date, it seems to me, should be 1-1-1932, from which date fresh transactions under the bond cease to be entered into.

[11] The next question for consideration is that of limtation. This has two aspects. There is first the portion of the debt covered by the security of the first bond. Limitation for this purpose is governed by Art. 132 of the Schedule to the Limitation Act, and began to run from 1-1-1932. The suit was, therefore, within time when it was filed on 2-1-1941. As regards the unsecured portion of the bank's dues as appearing in the defendant's current account, the contention of Mr. De, for the bank, is two-fold, firstly, that this is a mutual, open and current account, governed by Article 85 of the Schedule to the Limitation Act, and, secondly, that limitation is saved by certain payments made by the defendant.

[12] It is not contested that this is a current and open account, but is it mutual? The Subordinate Judge has answered this question in the negative. In contesting the correctness of this finding, Mr. De draws our attention to the fact found by the Subordinate Judge himself that between March 1922, and July 1927, there were credit balances in favour of the defendant on thirty-three occasions. The fact that there were oscillating balances in favour of the two parties is however not decisive. Thus, in A. I. R. 1922 Pat. 364[3], balances were found to have been in favour of the defendant on seventeen different occasions, and yet the account was held not to be a mutual one, the reason being that the credits were found to be small ones lasting for a few days at a time and created by small payments in the nature of repayments of indebtedness. On the other hand,in 58 Cal. 649[4], the account was held to be a mutual one though there was never a balance in favour of the defendant. The principle is explained by Rankin C. J. at page 668:

". . . whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by

way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set off to reduce the defendant's liability."

[13] The arrangement between the parties was that on the one side the plaintiff gave advance of money to the defendant, and on the other side the defendant sent consignments of tea from his tea estate to the plaintiff for selling it by public auction and crediting the sale proceeds, after deduction of commission and other charges, in the common account in which the advances were entered. The above was the point which his Lordship set himself to investigate, and, having found the latter alternative to be true, he held the account to be a mutual one. In 4 P. L. T. 571,[5] it was laid down that although a shifting balance is a test of mutuality, its absence is not conclusive proof against mutuality. According to their Lordships the test is, not that there must be a shifting balance, but that such was a possible and likely incident of mutual transactions in regard to which the account was kept.

[14] If we examine the transactions between the parties in the light of the above decisions, I have no doubt that this account cannot be regarded as a mutual one. For short periods from March 1922 to July 1927, there were small balances to the credit of the defendant, but from July 1927, to the filing of the suit, the account has been overdrawn throughout except for a short period of four days in August 1931, when the defendant suddenly deposited a total amount of Rs. 35,275-11-3. The whole of this deposit was withdrawn by 7th September. Apparently, the defendant had somehow come by the money and kept it in the bank until he could apply it to the purpose for which he got it. This is hardly a transaction forming part of a mutual dealing between the bank and the defendant. This solitary instance on which the defendant had a balance to his credit is more than eight years before the closing of the account, and during this time the position of the defendant continued to grow worse; and, the original security for Rs. 15,000 proving insufficient, the bank took a further security for Rs. 20,000. Can we resaonably say, in these circumstances, that there was a possibility of a shifting balance in favour of the defendant? I would answer the question definitely in the negative. It is possible that at one time the defendant was a depositor of the bank, but for years the position had entirely changed and the defendant was purely and simply a debtor of the bank. I would, therefore, hold that the account was not a mutual one, and that Art. 85 of the Schedule to the Limitation Act has no application.

[15] The payments relied on by Mr. De as saving limitation are as follows:

| | | |
|---|---|---|
| "13.-8.-34 | Rs. 1000 | Ex. 4. |
| 15.-8.-34. | Rs. 1000 | Ex. 4A. |
| 29.-7.-35. | Rs. 1150 | Ex. 4D. |
| 14.-9 -36. | Rs. 3000 | Ex. 4G. |
| 19-12-38 | Rs. 1200 | Ex. 4H." |

The pay-in-slips by which these amounts were deposited in the account are all signed by the defendant himself. Section 20, Limitation Act, as it stood at the time of the filing of the suit, required payment as such of "interest on a debt" or of part of "the principal of a debt." The payments were not made towards interest as such. If we take it that the payments were towards principal, the question arises, what is the "debt', the limitation for the recovery of which is thereby extended. If we could regard the balance of the account as a consolidated sum towards the payment of which the payment was made, it would be the debt of which the limitation was extended. But, as explained by my learned brother in A. I. R. 1942 Pat. 201,[6] an overdrawn current account cannot be regarded in this way. When the customer of a bank draws a cheque on it, knowing that the funds at his credit are insufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or a loan. Each such transaction is an independent loan, limitation for the recovery of which is determined by Art. 57 of the Schedule to the Limitation Act. Regarded in this light, each payment made by the customer over his signature goes to extend limitation in regard to the particular overdraft which it goes to repay, and which, in accordance with the rule in 1 Mer. 572,[7] would be the earliest item outstanding on the debit side. The payment would therefore be of no avail to save limitation in respect of the general balance of account. The fact that in this case part of the floating balance was secured would not make a difference in this respect. Such security does not by itself exclude the application of the rule. The rule continues to apply, the earlier advances being satisfied in chronological order, and the security covers the balance from day to day. The principle is explained by Buckley, L. J. in (1910) 1 Ch. 648[8] at p. 675:

> "A security in favour of a bank to secure a sum and further advances operates in the case of each further advance as a further disposition of the property made at the date of the further advance which takes effect by force of the antecedent deed of security."

Here, the position is somewhat complicated by the fact that at the time when these loans were given, the security no longer operated to cover new loans, but if during its operation the security did not affect the applicability of the rule in (1816) 1 Mer. 572[7] it would not do so after it

ceased to operate. The last overdrawal in the account was made in 1936. For the above reasons, therefore, recovery of the unsecured overdrawals was barred when the suit was instituted. This was the conclusion arrived at in A. I. R. 1942 Pat. 201[6] where it was held that the bank could recover only Rs. 30,000/ covered by the security and that the recovery of Rs. 5,000/ advanced in excess of this amount was barred, being governed by Art. 57 of the Schedule to the Limitation Act. There was a similar result in A. I. R. 1943 Pat. 301[9] in which case the bank got a decree only for the amount actually secured and nothing at all for a considerable overdraft in excess of that amount.

[16] This brings me to the question, how much if any of the amount due under the first bond has been satisfied?. There was no break in the account after the expiry of the period of that bond, and it has been argued that applying the rule in (1816) 1 Mer. 572[7] the amount secured by the loan must be taken to have been satisfied as soon as the entries on the deposit side became enough to pay off the items on the debit side covered by the bond, a condition which was certainly reached when the credit of Rs. 20,000/ was made in August 1933. We must remember in this connection that the rule in (1816) 1 Mer. 572[7] is not a rigid rule of law. It is merley a rule of evidence founded on a presumption of the creditor's intention; it will not be applied in a case where there are circumstances showing that the creditor had no such intention. In (1910) 1 CH. 648[8] Cozons-Hardy, M. R., who differed from the other members of the Court in his finding as to whether such circumstances existed, said :

"Now it is plain law that if you know nothing more than that the bank has kept an ordinary banking account and communicated it to the customer, the bank must be considered to have appropriated the earliest credits to the earliest debits, but it is equally clear that your are entitled, and indeed bound, to see whether there are any circumstances, including the conduct of the parties, sufficient to justfify you in arriving at a different conclusion":

[17] Fletcher Moulton, L. J. while deciding the case on the finding that such circumstances existed, went further and expressed his opinion that in the case of a secured account with subsequent payings in and payings out, a modified rule would apply and the presumed intention should be to apply the payments into the unsecured items in order of date in priority to the secured items. He expresses his reason for this opinion in words, which I will repeat with respectful agreement:-

"Although I base my judgment on the special facts of the case, I wish to add a word on what I think should be the result of the application of the law laid down in (1865) 9 H. L. C. 514[10] to the ordinary case of a mortgage to a banker to secure the balance of a customer's account. When the bank receives notice of a second mortgage by the customer to a third person it does not in my opinion affect the nature of the security. It remains a security for the balance of the account from moment to moment. But it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced and once reduced cannot again be raised. This fully satisfies the broad principle of justice referred to by Lord Blackburn and does not unnecessarily interfere with the position of the prior incumbrancer, All this is altered if the rule in (1816) 1 Mer 572[7] is to be applied in the manner contended for by the plaintiff. The security is no longer for the balance of an account, but for certain items on the debit side. In all their subsequent transactions the bank are presumed to have the intention of applying all payments into the destruction of their own security in favour of the subsequent mortgagee, although no sane man or sane jury could doubt that they meant to do exactly the contrary. And this is not by virtue of any rule of law. It purports to be the consequence of a rule of evidence—a conclusion of common sense to the effect that where there is nothing to indicate actual appropriation it is natural and proper to suppose that the eldest debit items are intended to be wiped out first. This is good common-sense where the items are on an equality, but not otherwise. Where some are secured by virtue of their being antecedent to the second mortgage no sane man would dream of extinguishing them in preference to the subsequent unsecured ones when it was a matter left to his choice. How, then can we impute to him such an intention? What is the consequence of our so doing? If the bank are not aware of the pit dug by the law for them they find their security gone. The second mortgage is put before the first mortgage because the law presumes in them an intention the very suggestion of which is ridiculous. If, however, they know of the pitfall they go through the simple formality of drawing two horizontal lines in their books and make believe to commence a new account and they are safe. I say "make believe", for it is not in truth a new account. That can only be started by arrangement with the customer. If the payments into this so-called new account shew a balance to credit the subsequent mortgagee can claim the benefit of them, because in truth it forms part of the account for which the security was given. The whole result of the formality is that the bank are placed in precisely the position which I have first described. The security remains a security for the balance of an account, but the amount of that security cannot be arised, but may be automatically reduced. Why should it be necessary to go through such a formality to effect this? The law has refused to apply the rule in (1816) 1 Mer 572[7] so as to work a wrong. Why should it apply it to cases where it would be to presume on the part of the prior incumbrancer an act of suicidal folly? No good is done thereby-it only entraps those who are unaware of the danger".

[18] In this view of the matter, it seems hardly necessary to investigate if there is evidence of an intention on the part of the bank not to appropriate payments in to the satisfaction of the secured debt. There first is the conduct of the parties, who seem to have treated the mortgage bond as existing security to the extent of Rs. 15,000. This is indicated by the bond being left, with the bank, and the taking of the subsequent mortgage for only Rs. 20,000 though the then existing overdraft was over Rs.

30,000. The other circumstance is the delay in the crediting of the Rs. 20,000 in this account. The loan was taken on the second mortgage bond in April 1933. The balance of the account was then Rs. 31,468-9-9. Had the money been credited then, the balance would have been reducted to less than Rs. 15,000 and the security of the first bond would have been lessened to that extent as explained in the passage cited above from the judgment of Fletcher-Moulton, L. J. Evidently, to avoid this, the credit into the current account was delayed till August 1933, when the overdraft had reached the figure of Rs. 36, 173-11-3. The loss suffered by the defendant by this delay was subsequently made good by crediting him with interest on this amount of Rs. 537-9-3. I would, therefore, hold that the secured account was not satisfied by the application of the rule in (1816) 1 Mer 572.[7]

[19] A further point, however, remains for investigation in this connection. It relates to the bank's right to charge interest. On the secured amount it had the right to do so under the bond, but incorrectly charged it at twelve annas per hundred rupees per month compoundable monthly instead of per year. As regards the unsecured amount, it is strenuously argued that they had not the right to charge any interest. It was laid down in I. L. R. (1938) 2 Cal. 72[11] that interest prior to the filing of the suit may be granted only under the terms of a contract, or under usage of trade having the force of law or under the provision of a substantive law. Here, it is urged, there is no substantive provision of law, and neither a contract nor usage of trade is proved. The pass book, however, shows that interest at this rate is being charged ever since February 1932, and there is no suggestion of any objection having been made by the defendant. It has been argued that the defendant did not know, and our attention has been drawn to his letter (Ex. D) asking for the return of his pass book. This letter is dated 5-8-1940, and says that the pass book "was left at the bank few years back and I did not get it back." I am not prepared to accept this letter as proof that ever since February 1932, a person of the defendant's standing and experience did not see his pass book. The defendant was paying interest on overdrafts ever since the commencement of the account, and could not have expected to get loans from the bank free of interest. In the circumstances from the absence of any objection on his behalf it is fair inference that he agreed to the interest charged in the pass book. It follows that the only mistake in the accounts is the compounding of the interest on the secured amount monthly instead of yearly.

[20] This brings us to the last point relative to the first bond, how much if any of the amount due under this bond has been satisfied? In the view which I have taken of the applicability of the rule in (1816) 1 Mer 572,[7] no question arises of a portion of this amount being satisfied by any of the deposits made prior to the credit of Rs. 20,000 on 16-8-1933. On that day the opening debit balance of the account as shown in bank book was Rs. 36, 173-11-3. This includes an excess charge arising out of the mistake in calculating the interest which I have pointed out above. The interest on Rs. 15,000 from 1-1-1932 to 15-8-1933, at twelve annas per hundred rupees compoundable with monthly rests comes to Rs. 2352-14-0. Compoundable with yearly rests it is Rs. 2269-11-0. The difference between the two sums Rs. 83-3-0 is the overcharge. The correct opening balance on the 16-8-1933, was therefore Rs. 36,173-11-3 minus Rs. 83-3-0 i. e. Rs. 36,090-8-3. Out of this the amount secured by the first bond was Rs. 16,350, the amount of principal as compounded on 1st January 1933, and Rs. 919-11-0, the interest for the current year, making a total of Rs. 17,269-11-0. The credit of Rs. 20,000 would go first to satisfy the unsecured debt, which on that day was rupees 36,090-8-3 minus Rs. 17,269-11-0 i. e. Rs. 18,820-13-3. The balance of the Rs. 20,000 would go to satisfy the secured debt, being applied first to satisfy the interest and then the principal as provided in the bond. The result would be to wipe out the interest altogther and to reduce the principal to Rs. 16,090-8-3. From then onward the plaintiff bank would be entitled to get interest at the bond rate on this sum, applying fresh deposits to the satisfaction of unsecured and then of secured debt in the manner indicated above.

[21] I turn now to the bond of 1933 (Ex. 1 (a)). The first contention regarding it is that there was no consideration for it. This contention is based on the assumption that the case of the plaintiffs bank is that the consideration for the bond was paid in cash. Although an issue was framed as to whether any portion of the consideration was paid in cash, I do not find anything in the plaint or in the plaintiff's evidence to justify the assumption. The plaint merely mentions Rs. 20,000 as being the amount secured by the bond. It does not say whether the amount was paid in cash or only by a credit in the accounts. In the oral evidence the witnesses are definite that no actual payment in cash was made and that the consideration passed by way of a book transaction. This, however, makes no difference to the actual passing of consideration, for, as we have seen in the discussion relative to the first bond, the money secured by the second bond was actually applied to the reduction by Rs 20,000 of the debt owing from the defendant to the bank.

[22] Another contention regarding this bond is that the consideration for this bond was the amount due on the first bond, and so the bank cannot ask for a decree in respect of both the bonds. In support of this contention, our attention is drawn to the statement of the bank manager, P. W. 1, "That document (the second bond) was executed in payment of dues of the first bond." This is merely the interpretation put on the transaction by the witness, but the question has to be decided by the Court on a construction of the instrument itself and by an examination of the manner in which the advance made on the bond was actually applied. The mortgage bond refers to the first mortgage bond but, beyond mentioning it, says nothing to connect the taking of the fresh loan with the satisfaction of the amount due under the first bond. As the accounts disclose, there was money due to the bank in excess of that secured by the first bond, and in accordance with the rule in (1816) 1 Mer. 572[7] we must take this advance to have been applied first to the satisfaction of the unsecured amount. To some extent as I have shown the money went to pay off money due under that bond. To that extent, there will necessarily be no decree on the first bond. Apart from this, there is nothing to prevent the bank from getting a decree based on both the bonds.

[23] Thirdly, it is contended that the amount borrowed on the second bond must be applied to the satisfaction of the debts of the defendant as they stood on that date. On that day, the opening debit balance of the overdraft amount was about Rs. 35,500. It is argued that deducting Rs. 5787-9-9, on account of interest charged to the account from January 1932 onwards, and Rs. 15,000 (inclusive of interest) due on the first bond, the consideration for the second bond should be taken at the utmost to be about Rs. 10,600. I have held above that the bank was entitled to charge interest as shown in the accounts, except on the secured amount, and for that mistake I have made due allowance in arriving at my result. As for the necessity for applying the loan to the satisfaction of the existing debts on that very day, we have been shown no authority for it. The bond itself gives no directions to this effect, and it is not suggested that any instructions for the immediate application of the loan for this purpose were given by the defendant. The bank was, therefore, entitled to apply the money according to its convenience and so as to safeguard its own interests. I have shown above how it did this, and how by delaying credit in the overdraft account it avoided the reduction of the security under the first bond to a greater extent than has taken place—an act which seems to have been in accordance with the intention of the parties. Any loss that the defendant might have suffered by this procedure has been compensated for by crediting him with interest at the bond rate for this period of delay, although there was no provision in the agreement for such interest. When the bank gave credit to the defendant in its loan account, the money was at the disposal of the defendant, and the consideration for the bond must be taken to have passed in full on the day of its execution.

[24] Finally, a prayer is made on behalf of the appellant that the amount found due from him be made payable in instalments under the provisions of O. 20, R. 11, Civil P. C. This prayer cannot be granted as it is clear from the terms of this rule that it applies to a money decree and not to a mortgage decree.

[25] This disposes of the appeal and I turn to the cross-objection. The bank has already got a decree for its full claim on the second bond from the Subordinate Judge. It seeks a similar decree in respect of the first bond. I have indicated above the extent to which it can get a decree on this bond.

[26] In the result, I would uphold the decree of the Subordinate Judge so far as it relates to the bond of 1933. I would modify the decree relative to the bond of 1928 by allowing interest at the bond rate from 1-1-1932 up to the date of the suit and at six per cent. simple per annum *pendente lite*. The amount due on the bond will be calculated in the manner indicated by me at pages 15-16 above. The appeal will be dismissed with costs and the cross-objection allowed in part with proportionate costs.

**Shearer J.**—I agree.

D.S. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 25** *[C. N. 9.]*

DAS J.

*Dalu Gour and others* — *Petitioners* v. *Moheswar Mahato*—*Opposite Party.*

Criminal Ref. No. 38 of 1946, Decided on 30-10-1946.

**(a) Criminal P. C. (1898), S. 192—Transferee Court's powers of transfer before issue of process.**

It is well settled that when a case is transferred to a subordinate Magistrate under S. 192 (1) the latter has the same authority to deal with the case as regards issuing of process and other matters connected with the inquiry or trial as it vested in the superior Magistrate from whom he receives the case on transfer. The transfer may be made as soon as the transferring Magistrate has taken cognizance of the case; he need not wait for the stage when the accused person appears as a result of the issue of the process. [Para 4]

**Annotation:**— ('46-Com), Cr. P. C. S. 192 N. 8.

**(b) Criminal P. C. (1898), S. 202—It is irregular for a Magistrate to order inquiry in a case in which cognizance has been taken on a police report.** [Para 5]

**Annotation:**— ('46 Com.) Cr. P. C. S. 202 N. 5 Pt. 1.

(c) Criminal P. C. (1898), S. 190—Taking cognizance—Taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence. 37 Cal. 412 and 28 A. I. R. 1941 Cal. 185, *Foll.* [Para 4]

Annotation :—('46-Com.) Cr. P. C., S. 190 N. 3.

*Cases referred* :—

1. ('10) 37 Cal. 412 : 6 I. C. 8, Sourindra Mohan v. Emperor.
2. ('40) 44 C. W. N. 1114:28 A. I. R. 1941 Cal. 185: I. L. R. (1941) 1 Cal. 67: 194 I.C. 38, Hafijar Rahman v. Aminal Hoque.

*S. C. Chakraverty and S. K. Mazumdar* — for Petitioners.

*Gopal Prasad*—for Opposite Party.

**Order.**—This is a reference by the learned Sessions Judge of Manbhum-Singhbhum under the provisions of S. 438, Criminal P. C. for quashing, the case against eight persons who have been summoned to stand their trial for an alleged offence under S. 379/109, Penal Code. The main ground which has been given by the learned Sessions Judge in his letter of reference can be best expressed in his own words:

"In my opinion, there does not appear to be any material before the Court for prosecuting these petitioners and that being the position, the order of the learned Magistrate issuing process and summoning the petitioners should be set aside and the proceedings so far as these petitioners are concerned should be quashed."

The learned Sessions Judge has also referred to another ground relating to the question of jurisdiction though he has not made that the main ground for his recommendation. Therefore, two points arise for consideration, (1) Whether the Magistrate who issued process against the petitioners was legally competent to do so; and (2) whether there were any materials before the Magistrate on which the petitioners before the learned Sessions Judge, could be tried for the offence in question.

[2] In order to appreciate the points raised, it is necessary to set out some of the relevant facts. On 17-11-1945, one Moheswar Mahato filed a petition against 10 persons including the 8 persons whose case has been referred to this Court by the learned Sessions Judge, for action under S. 144, Criminal P. C. as respects an apprehended breach of the peace over the harvesting of the paddy crop on two plots of land (Plots 48 and 49). This petition was sent by the learned Subdivisional Magistrate of Jamshedpur to the Sub-Ispector of Police, Sakchi Police Station, for an enquiry and report. The learned Magistrate also directed the police officer to see that no breach of the peace took place over the harvesting of the paddy crop. On 26-11-1945, the Sub-Inspector of Police, Sakchi Police station, reported that one Jagu Dutta (one of the persons summoned by the learned Magistrate whose case has not been referred to this Court by the learned Sessions Judge) had got the paddy cut with the help of 40-50 labourers from the plots in question on the night of the very day on which the petition was filed by Moheswar Mahato, namely, 17-11-1945. The Sub-Inspector of Police made a prayer in his report that Jagu Dutta and other accused persons mentioned in the petition of 17-11-1945, should be summoned to stand their trial for an offence under S. 379, Penal Code. This report of of the Sub-Inspector of Police was put up to the learned Magistrate on 27-11 1945, and on that date the learned Magistrate passed an order to the following effect:

"Read police report on the petition filed by Moheswar Mahato. Ask S. I. to institute a case under Ss. 379 and 379/109, I. P. C. to investigate and to report."

The learned Subdivisional Magistrate also called upon Jagu Dutta to show cause why he should not be asked to execute a bond for keeping the peace. We are not concerned in this case with the latter part of the order of the learned Magistrate. On receipt of the aforesaid order of the learned Magistrate, the Sub-Inspector of Police drew up a formal first information report on the orginal petition of 17-11-1945, and his own report dated 26-11-1945.

[3] The learned Sessions Judge has proceeded on the footing that the formal first information report drawn up by the Sub-Inspector of Police consisted only of the original petition of 17-11-1945, which was filed before the alleged theft of crops. In the final report submitted by the local police under S. 173, Criminal P. C. it was clearly mentioned that the report which the Sub-Inspector had submitted on 26-11-1945, was part of the first information report, because it was that report which showed the commission of an offence. The case was investigated into by the Sub-Inspector of police and was supervised by the Divisional Inspector. Several petitions were filed against the investigation by the local police details of which need not be given. On 2-1-1946, the Sub-Inspector of police submitted a final report under S. 173, Criminal P. C. as directed by the Divisional Inspector, to the effect that the harvesting of crops was true but the dispute was of a civil nature. This final report was put up to the Sub-divisional Magistrate of 9-1-1946, on which date he passed the following order:

"It appears that the police instituted a case and submitted a final report. Put up with the connected records before the City Magistrate to-morrow."

The City Magistrate was one Mr. B. K. Dutta. He dealt with the matter on 11-1-1946, when he recorded the following order:

"Perused the Final Report and Supervision note of the Inspector of police. Heard the parties. The petitioner prays for a judicial enquiry. This appears to be a fit case for a judicial enquiry. To Mr. G. K. Prosad, Magistrate for favour of a judicial enquiry and report by 27-1-46."

After conclusion of the judicial enquiry, Mr. G. K. Prosad, the Magistrate who held the judicial enquiry, submitted his report on 11-3-1946. He recommended that Jagu Dutta and the 8 persons whose case is under consideration here should be summoned for an offence under Ss. 379 and 379/109, Penal Code. On 12-3-1946, Mr. B. K. Dutta, the City Magistrate, summoned Jagu Dutta and 9 other persons. Of the 9 persons, one died and the remaining eight are the persons whose case has been referred to this Court by the learned Sessions Judge.

[4] The first question for consideration in the circumstances mentioned above is if Mr. B. K. Dutta was legally competent to summon the accused persons. I am of the opinion that Mr. B. K. Dutta was legally competent to summon the accused persons and put them on trial. My reasons are the following. The Subdivisional Magistrate of Jamshedpur was competent to take cognizance of an offence on a police report, under clause (b) of sub-S. (1), S. 190, Criminal P. C. The report, which the Sub-Inspector of police submitted under S. 173, Criminal P. C. was a report on which the Subdivisional Magistrate was competent to take cognizance. After taking cognizance, the Sub-divisional Magistrate could transfer the case to any Magistrate subordinate to him, *vide* sub-S. (1), S. 192, Criminal P. C. It is well settled that when a case is transferred to a subordinate Magistrate under S. 192 (1), Criminal P. C., the latter has the same authority to deal with the case as regards the issuing of process and other matters connected with the enquiry or trial as is vested in the superior Magistrate from whom he receives the case on transfer. It is also clear that the transfer may be made as soon as the transferring Magistrate has taken cognizance of the case; he need not wait for the stage when the accused person appears as a result of the issue of process. It has not been seriously disputed before me that the City Magistrate is subordinate to the Subdivisional Magistrate of Jamshedpur. Under S. 17 (2), Criminal P. C., every Magistrate (other than a Sub-divisional Magistrate) and every Bench exercising powers in a sub-division shall be subordinate to the Sub-divisional Magistrate. The Sub-divisional Magistrate was, therefore, competent to transfer the case to the City Magistrate. I am of the view that the order of the Sub-divisional Magistrate dated 9-1-1946, which I have already quoted, is really an order of transfer under S. 192 (1), Criminal P. C. The expression "cognizance" has not been defined in the Code. There are several decisions to the effect that taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence (*vide* the observations made in 37 Cal. 412[1] and 44 C. W. N. 1114[2].

[5] The learned Sub-divisional Magistrate had applied his mind to the suspected commission of an offence and on receipt of the final police report he directed that the case be made over to the City Magistrate. I do not think the order of the learned Sub-divisional Magistrate dated 9-1-1946, can bear any other interpretation. Even if it be conceded that the Sub-divisional Magistrate had not taken cognizance when he transferred the case to the City Magistrate, the defect would not be a ground for setting aside the proceedings : *vide* S. 529, Criminal P. C. For these reasons, I am of the view that the City Magistrate when he received the case from the Sub-divisional Magistrate was legally competent to deal with the case as regards the issuing of process etc., in the same way as the superior Magistrate from whom the case was received on transfer. He was, therefore, legally competent to issue process against the accused persons. There has been some argument before me as to whether Mr. B. K. Dutta was competent to order a judicial enquiry by another Magistrate Mr. G. K. Proshad under S. 202, Criminal P. C. The learned Sessions Judge is of the opinion that it was irregular to order a judicial enquiry under S. 202, Criminal P. C. when there was no complaint. There is no doubt that when there is a complaint on which cognizance has been taken and which has been transferred to another Magistrate under S. 192, Criminal P. C. the latter Magistrate is competent to postpone issue of process and direct an enquiry or investigation. The provisions of S. 202, Criminal P. C. make this very clear. The question, however, is if an enquiry can be ordered in a case in which cognizance has been taken not on a complaint but on a police report. I am inclined to agree with the learned Sessions Judge that S. 202 is confined to cases instituted on a complaint. The opening words of the section read as follows:

> "Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been transferred to him under S. 192, may, if he thinks fit etc. . . "

The pronoun 'which' occurring in those words can refer only to the preceding noun 'receipt of a complaint of an offence.' If that be the correct interpretation of S. 202, then the Magistrate, who receives the case on transfer can direct an enquiry if the complaint has been received on transfer by him. It is also worthy of note that S. 202 occurs in the chapter dealing with complaints to Magistrates. The power to issue process under S. 204, Criminal P. C. occurs in the next chapter dealing with the commencement of proceed-

ings before Magistrates. Though S. 204 says that the Magistrate taking cognizance can issue process, it is now well settled (as stated above) that the Magistrate to whom the case is transferred under S. 192 has the same power which the Magistrate taking cognizance had, to issue process against the accused persons. Accepting therefore, the position that Mr. B. K. Dutta could not have ordered an enquiry under S. 202, Criminal P. C., the question still remains if this irregularity deprived him of jurisdiction to issue process against the accused persons and try them. In my opinion, the irregularity did not deprive Mr. B. K. Dutta of the jurisdiction which he had to deal with the case on transfer to him by the Sub-divisional Magistrate under the provisions of S. 192, Criminal P. C. Mr. B. K. Dutta was competent to issue process on a consideration of the police report itself. My view, therefore, is that the proceedings cannot be quashed on the ground that Mr. B. K. Dutta was not legally competent to issue process and try the accused persons.

[6] Then comes the next question if there were materials before the learned Magistrate for putting the accused persons on trial for an offence under S. 379/109, Penal Code. It is to be noted that the case of Jagu Dutta is not before me, the learned Sessions Judge having referred the case of the other eight persons only. The main reason given by the learned Sessions Judge for his finding that there are no materials against these eight persons is that their names occur in the petition of 17-11-1945, which was filed before the harvesting of the crop, and that their names do not occur in any subsequent document. I have carefully examined the police report dated 26-11-1945, as also the final report dated 2-1-1946. In both those reports, there is a mention of the accused persons, and the reference undoubtedly was to the names mentioned in column 2 of the first information report. In that column the names of all these eight persons were written and in the body of the reports the names were not repeated, but these persons were referred to as the accused persons. I am unable to agree with the learned Sessions Judge that there were no materials before the Magistrate on which he could proceed against these eight persons. The two police reports themselves show that Jagu Dutta along with many other persons, including the eight persons mentioned above had harvested the crop from the two plots in question. On those reports it was open to Mr. B. K. Dutta to issue process. Whether there will be reliable evidence against these persons at the trial is a different question which does not arise for consideration at this stage. All that can be said at this stage is that there were materials before the learned Magistrate which made out a prima facie case for the issue of process against Jagu Dutta as well as the other persons mentioned in column 2 of the first information report.

[7] For the reasons given above, I am unable to accept the recommendation of the learned Sessions Judge that the proceedings should be quashed in this case. The reference, therefore, fails and is rejected.

G.B. *Reference rejected.*

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## A. I. R. (35) 1948 Patna 28 *[C. N. 10.]*

IMAM AND DAS JJ.

*Pratap Narain Das and another*—*Appellants* v. *Sri Krishna Chandra and others*—*Respondents.*

Appeal No. 1052 of 1944, Decided on 1-4-1947, from appellate decree of Addl. Dist. Judge, Bhagalpur, D/- 4-7-1944.

**Specific Relief Act (1877), S. 42— Interference with possession of plaintiff— Suit for mere declaration of title— Maintainability.**

Where a cloud has been thrown on the title of the plaintiff by the conduct of the defendant but there is no evidence to show that the plaintiff was ever dispossessed by any act of the defendant, a suit for a mere declaration of title without any further relief is maintainable. Such suit is not barred by the fact that the defendant interfered with the possession of plaintiff as interference with possession is not necessarily dispossession. [Para 4]

*L. K. Jha and G. P. Sahi*— for Appellants.
*S. C. Mazumdar*— for Respondents.

**Imam J.**— This is an appeal by the defendants against the decision of the third Additional District Judge of Bhagalpur decreeing the plaintiff's suit praying for a declaration that he had acquired proprietary right in mouza Raisri Milik by adverse possession. The Subordinate Judge who tried the suit came to the conclusion that the plaintiff had acquired title over the said village by adverse possession. He, however, dismissed the suit as he was not satisfied that the plaintiff had established that there was any dispute between him and the defendants first party regarding the village in question in February 1942 and consequently no cause of action accrued to him. Several issuses were framed before the learned Subordinate Judge amongst which issue 3 was as follows: "Is the suit barred by S. 42, Specific Relief Act"? At the hearing this issue was not pressed and the Subordinate Judge consequently held that this section did not bar the suit. The plaintiff then appealed against the decision of the Subordinate Judge and urged two points before the lower appellate Court. The first point urged was that there had been interference by the defendants first party with the plaintiff's possession

over the mauza in February 1942. The second point urged was that even without any proof of such interference the plaintiff was entitled to the relief that he sought for a declaratory decree in the suit. The appellants in this Court were faced with a finding contrary to their case, namely, that the plaintiff had acquired a title by adverse possession and apparently they did not make any submissions before the lower appellate Court against this finding.

[2] Mr. Jha on behalf of the appellants has strongly contended that under the provisions of S. 42, Specific Relief Act, the suit ought to have been decreed (dismissed) as on the facts alleged by the plaintiff he could not get merely a declaratory decree. He ought to have sought further relief. He relied upon the proviso to S. 42. He further contended that even if in February the appellants interfered with the plaintiff's possession of the mauza that act amounted to dispossession.

[3] Since no submissions appear to have been made before the lower appellate Court on behalf of the appellants against the finding of the Subordinate Judge regarding the plaintiff having acquired title by adverse possession, it seems to me somewhat difficult to permit the appellants in second appeal to re-open that question. But even if it were permissible to do so, the Subordinate Judge has given such ample reasons to justify his conclusion that it seems to me it would be sheer waste of time to repeat the grounds given by him. The most significant circumstance, in my judgment, which supports the case of the plaintiff is that ever since the year 1929 to 1942 there is no documentary evidence whatever to prove that the appellants ever collected, as proprietors, rent from the tenants of the village in question. Indeed the defendant 1 as D. W. 1 admitted that the defendants first party never collected rent from the tenants of the mauza in suit. On the other hand, the plaintiff produced series of rent receipts to show that the tenants of the village had been paying rent to him. He also produced a sale certificate, Ex. 7 series, which would show that the plaintiff had in execution of his rent decrees got some of the lands of the mauza sold and that he purchased some of those lands. I need not say any more than this that the finding of fact on this question by the Subordinate Judge was fully justified and does not appear to have been questioned before the lower appellate Court. It follows, therefore, that both the Courts below were right in holding that the plaintiff has acquired title over the village in question by adverse possession.

[4] As to the objection raised Mr. Jha that S. 42, Specific Relief Act, is a bar to giving the plaintiff the declaration which he sought, it is sufficient to say that this was not pressed before the Subordinate Judge and he held that S. 42 was not a bar. The lower appellate Court held that in February 1942 the defendants first party did interfere with the possession of the plaintiff. Interference with possession is not necessarily dispossession. It would also appear that there is no reliable evidence of any kind to show that the plaintiff was ever dispossessed by any act of the defendants. It seems to me, therefore, that apart from a mere declaration of his title the plaintiff had no need to ask for any further relief. That he was entitled to ask for the declaration seems to be clear in view of the cloud which had been thrown on his title by the conduct of the defendants in attempting to collect rent from the village as proprietors. In these circumstances, I am of the opinion that the lower appellate Court rightly ordered that the plaintiff's title to the village in question will be declared. The appeal must be dismissed with costs.

**Das J.**— I agree.

D.S. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 29** *[C. N. 11.]*

MEREDITH J.

*Jagdish Singh and others* — *Petitioners* v. *Emperor.*

Criminal Revn. No. 57 of 1947, Decided on 11-4-1947, from order of Addl. Sessions Judge, Saran, D/- 25-11-1946.

**(a) Criminal P. C. (1898), S. 439—New plea involving questions of fact and law and inconsistent with defence in lower Courts, cannot be raised in revision.**

The accused were being prosecuted under S. 193, Penal Code, for making false attestations on a service report to the effect that certain notice had been served on *R.* In the Courts of fact, the accused tried to prove that service had actually been made upon *R* and that the attestations made were correct. In revision the accused put forward a contention that there was no evidence that the attesting witnesses were aware that the notice was to be served on *R* and no one else and so there was nothing to show that the attestations they were making were false.

*Held* that the point raised involved questions of fact as well as law and therefore, it ought to have been raised in the Courts of fact, and it was not open to the accused to raise such a contention in revision: 6 A. I. R. 1919 Pat. 528, *Ref.* [Para 4]

**Annotation :** ('46-Com.) Criminal P. C., S. 439 N. 44.

**(b) Criminal P. C. (1898), S. 439—No possibility of miscarriage of justice—No interference in revision.**

It is not the practice of the High Court of Patna to interfere in revision unless it considers that there is a real possibility that there has been a miscarriage of justice. [Para 6]

**Annotation :** ('46-Com.) Criminal P. C., S. 439 N. 1.

*Case referred :—*

1. ('19) 6 A. I. R. 1919 Pat 528: 52 I. C. 417, Prayag Singh v. Emperor.

*M. Fazl Ali*—for Petitioners.

*Girija Nandan Prasad*—for the Crown.

**Order.**— The petitioners have been convicted under S. 193 Penal Code and sentenced to one month's rigorous imprisonment each. Their appeal has been dismissed by the learned Additional Sessions Judge of Saran.

[2] The money, Rs. 4000 due on a mortgage was deposited in the Court of a Munsif at Chapra to the credit of Ram Chander Singh and another, sons of the mortgagee, Sahodra Kuer, under S. 83, T. P. Act. An application was then made to the Munsif to depute a special peon to serve the notice of deposit The notice (EX. 3) was made over to a Court peon (P. W. 6) for service, and the peon duly put in a service report to the effect that he could not find Ram Chander's brother, but he effected service on Ram Chander Singh who took the notice for himself and his brother, but refused to give a receipt. Laldip Singh attested the service report as identifier, and the three petitioners, attested as witnesses, one of them being the chaukidar. Subsequently, Ram Chander appeared before the Munsif and filed an objection that on the date of the alleged service he was not at the place specified, Piprahia, but at Bagha in the district of Champaran. After enquiry, the petitioners and the identifier were all prosecuted and convicted. The appeal of all four was dismissed, but the identifier has not come up to this Court in revision.

[3] I have been asked to go into the evidence on the question as to whether Ram Chander could have actually been at Piprahia at 7 A M. on the 1st of September when notice was reported to have been served. But this is a pure question of fact. There is the clearest finding of fact by the Court below that the evidence on record leaves no room for doubt that Ram Chander Singh could not have been at Piprahia. This finding cannot be disturbed in revision.

[4] The point which has been mainly urged is that there is no evidence that the attesting witnesses were aware that the notice was to be served on Ram Chander and no one else, and so there is nothing to show that they knew that the attestations they were making were false. This contention is supported by reference to the case in *Prayag Singh* v. *Emperor* (A. I. R. 1919 Pat. 528[1]) which is certainly a case in point, but it is the decision of a Judge sitting singly and is not an authority binding upon me. Apart from that, I am of opinion that it is not really open to the petitioners to put forward a contention like this at this stage, because they did not take any such defence. On the contrary, they took a line of defence which was inconsistent with the present contention. They insisted and tried to prove that service had actually been made upon Ram Chander, and that the attestations made by them were in fact correct. It was not suggested on their behalf that they did not know Ram Chander, and, being local people including the chaukidar, they must have known him, and it was not suggested that they did not know that Ram Chander was the person to be served. The point now raised involves questions of fact as well as law and quite clearly, therefore, it ought to have been raised in the courts of fact. Having regard to the defence taken, we cannot assume at this stage the possibility of a state of affairs necessary before the point of law urged can be said to arise. It may, I think, safely be taken that the petitioners knew Ram Chander. The peon at the trial could not identify them as he had forgotten their faces. That was natural, but he could prove, and did prove, that he effected the service in the presence of the persons who attested their names on the report Now let us consider the possibilities. If the person served was an imposter and posed as Ram Chander, the petitioners must at once have detected the fraud, and could not have made *bona fide* attestations. But suppose that the man did not say he was Ram Chander, nevertheless the identifier certainly identified the man as Ram Chander in the presence of the peon and the petitioners. If he had not done so, the peon would at once have realised the position Therefore it seems impossible to suppose that the petitioners did not know that the identifier was identifying a man as Ram Chander. It seems to me that the possibility, in the circumstances, of their having believed that the process was not to be served on Ram Chander but on some one else is so remote that for all practical purposes it can be disregarded

[5 Of course there is always one other possibility. It might be that the whole report was false, as sometimes happens, and that the peon really did not go to the spot or attempt service at all. But that would only make the position worse for the petitioners who attested the report. In that case also they must have known that they were attesting a false report.

[6] It is not the practice of this Court to interfere in revision unless it considers that there is a real possibility that there has been a miscarriage of justice. In the present case I am of opinion that there is no such possibility, and it cannot be doubted that the petitioners were parties to the preparation of a report which has been found to be a false report.

[7] In the circumstances the rule is discharged.

V.B B. *Rule discharged.*

**A. I. R. (35) 1948 Patna 31** *[C. N. 12.]*

IMAM J.

*G. Ramchandra Naidu and others—Petitioners* v. *A. Manu Swamy Naidu— Opposite Party.*

**Criminal Revn. No. 258 of 1946, Decided on 10-2-1947, from order of Addl. Dist. Magistrate, Cuttack, D/- 12-10-1946.**

**(a) Criminal P. C. (1898), S. 204—Order summoning accused—Rescission of.**

**There is nothing in the Code directly prohibiting a Magistrate from rescinding his previous order summoning the accused: 10 A. I. R. 1923 Cal. 662, *Rel. on.***

[Para 2]

('46-Com.) Criminal P. C., S. 204 Note 11 Pt. 1.

**(b) Criminal P. C. (1898), Ss. 435 and 436—Order for further inquiry—Revision against— Trying Magistrate summoning accused but on reconsideration rescinding his previous order and dismissing complaint— District Magistrate setting aside latter order and directing further enquiry— High Court held to have ample power in revision to see whether further enquiry was justified.**

[Para 2]

('46 Com.) Criminal P. C., 436 Note 30 Pt. 1.

**(c) Criminal P. C. (1898), S. 436—No prima facie legal evidence connecting accused with offence— Order directing further enquiry held not proper.**

[Para 2]

('46 Com.) Criminal P. C., S. 436 Note 5 Pt. 24.

*Case referred:—*

**1.** ('24) 77 I. C. 816:10 A. I. R. 1923 Cal. 662, Lalit Mohan v. Noni Lal.

*M. S. Rao*—for Petitioners.

*K. M. Swain*—for Opposite Party.

**Order.**— This is an application against the order of the Additional District Magistrate of Cuttack ordering further enquiry against the petitioner. It appears that the opposite party filed a complaint before the Sub-divisional Magistrate on 26-8-1946 under certain sections of the Penal Code. The Magistrate sent the complaint to a Deputy Collector for enquiry and report. On receipt of the report on 19-9-1946, the Magistrate (the second officer) recorded the following order: "Report of Sri B. C. Das Deputy Collector received. Summon accused under S. 379, Penal Code fixing 23-10-1946." It appears that before processes could issue on the same day, it was represented to the second officer on behalf of the petitioners that there was no case against them. The second officer then cancelled his previous order and stated that he did not find legal evidence connecting the accused with any offence of theft. There was nothing on the report of the enquiring officer to substantiate a case under S. 447 or 403. He accordingly dismissed the complaint under S. 203, Criminal P. C. The complainant moved the District Magistrate against this order. The Additional District Magistrate thought that the procedure adopted by the second officer was open to serious objection. He should have heard the complainant before he cancelled his previous order and that the accused had no locus standi to be heard until the summons were formally served on them. He accordingly set aside the order dismissing the complaint and directed further enquiry.

[2] The principal question for consideration has been as to whether the second officer could in law rescind his previous order summoning the accused. Admittedly no summonses were actually issued and the question for consideration is whether the second officer could go back on his order summoning the accused. There is nothing in the Code of Criminal Procedure which directly prohibits the Magistrate from doing so, and a decision of their Lordships of the Calcutta High Court in 77 I. C. 816[1], may be referred to. In that case their Lordships observed. "There is nothing in the Code which forbids a Magistrate to reconsider an order of this kind on sufficient grounds." The matter, however, is entirely technical, for whether one treats the dismissal of the complaint as one under S. 203 or treats the case as one of discharge, this Court in its criminal revisional jurisdiction has ample power to see whether further enquiry was justified. I have looked into the report of the Deputy Collector to whom the complaint was sent for enquiry and I am not in the least surprised that the second officer held on that report that he did not find any legal evidence connecting the accused with any offence of theft or that there was anything in that report to substantiate a case under S. 447 or S. 403. Mr. Swain on behalf of the complainant has urged that the report of the Deputy Collector is defective and it does not indicate the true state of affairs. He urged that the Deputy Collector was a newly appointed Magistrate and inexperienced. I am not in a position on the materials before me to say as to whether the Deputy Collector was one who was inexperienced. He certainly in his report has given a summary of the dispute between the parties and I am quite certain that if the complainant's witnesses had specifically stated that they had seen any one of the accused removing any article belonging to the complainant, the Deputy Collector would not have failed to mention that fact in the report. Mr. Swain further urged that it would be better for the ends of justice that the case of both the parties may be thoroughly investigated as ordered by the Additional District Magistrate. It seems to me, however, that when *prima facie* there is no legal evidence so far available to connect any of the accused with the offence of theft or to substantiate the complainant's case under S. 447 or S. 403 it would be quite wrong to harass the accused with facing either a further enquiry or a trial. In the circum-

stances the application is allowed and the order of the Additional District Magistrate is set aside and that of the second officer restored.

D.H. *Application allowed.*

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## A. I. R. (35) 1948 Patna 32 *[C. N. 13.]*

RAY J.

*Ramautar Lal—Petitioner* v. *Emperor.*

Crim. Revn. No. 1133 of 1946, Decided on 10-12-1946, against order of Sessions Judge, Monghyr, D/- 29-7-1946.

**Criminal P. C. (1898), S. 403 (4)—Competency of Court to try subsequent offence—Prosecution under Central Cloth and Yarn Control Order—No sanction under Cl. 23 of Order—No conviction—Subsequent prosecution on identical facts under Bihar Cloth and Yarn Control Order (1945), Cl. 3, held barred under S. 403 (4).**

Accused was prosecuted for contravention of Central Cloth and Yarn Control Order. The case, however, could not end in conviction inasmuch as sanction of the Provincial Government as required by Cl. 23 of the Order had not been obtained. Accused was thereafter prosecuted on same facts for offence consisting in contravention of the Cl. 3, Bihar Cloth and Yarn Control Order, 1945:

*Held* that the second trial was barred under S. 403, Cr P. C. Offence for which the accused was being tried in the subsequent prosecution was within the competence of the previous Court to try though the other offence with which he had been charged in that case namely under Central Cloth and Yarn Control Order, 1944 could not be tried for want of sanction: 34 A.I.R. 1947 Pat. 290, *Rel. on*; 13 A.I R. 1926 Pat. 302, *Explained and distinguished.* [Para 6]

('46 Com.) Criminal P. C., S. 403 Note 11, Pt. 2.

*Cases referred*

1 ('46) 1946 P.W.N. 169: 34 A.I.R. 1947 Pat. 290: 228 I.C. 378, Gauri Shanker Rai v. Emperor.

2. ('26) 5 Pat. 452: 13A.I.R. 1926 Pat. 302:95 I.C. 929, Mahomed Yasin v. Emperor.

*M. K. Mukherjee*— for Petitioner.

*Prem Lall*—for the Crown.

**Order**. — This rule was directed against an order of conviction of the petitioner under R. 81 (4) Defence of India Rules read with Cl. 3, Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944, as amended by the Bihar Cloth and Yarn Control Order, 1945.

[2] The allegations giving rise to this prosecution were shortly that the petitioner was found storing and selling standard cloth for a price more than its controlled price. The petitioner was a licensee as a general cloth merchant but had not the special license for storing and selling standard cloth. The acts consisting in the facts stated made out two offences (1) under the Central Cotton Cloth and Yarn Control Order for having sold a cloth for more than its controlled price and (2) for contravention of Cl. 3, Bihar Cloth and Yarn Control Order for having dealt in cloth without a license.

[3] Previous to this case another prosecution had been started against the petitioner for contravention of the Central Cloth and Yarn Control Order for having sold the cloth for a price more than the controlled price. The case, however, could not end in conviction inasmuch as sanction of the Provincial Government as required under Cl. 23 of the Order had not been obtained. Having been thus unsuccessful in the previous prosecution, the present had been started for the offence consisting in contravention of Cl. 3, Provincial Cloth Control Order arising out of the identical acts of the petitioner. This prosecution has ended in conviction against which this rule has been issued.

[4] The only contention that has been urged and I think successfully is that this prosecution is barred by the principle of *autrefois acquit*. It has been strenuously contended by Mr. Prem Lall appearing for the Crown that as the previous conviction was incompetent for want of sanction of the Provincial Government, the trial Court cannot be said to be competent to try the offence with which the petitioner had been charged in the previous trial, and he contends, therefore, that the case does not fall within the purview of S. 403 (1), Criminal P. C. Confining one's attention to sub-S. (1) of S. 403, this argument no doubt carries a measure of conviction, but reading the section as a whole, it does not seem to me to be sound. The principle that has been sought to be enacted in the section is that no man should be vexed with several trials for offences arising out of the identical acts committed by him. The argument of the learned counsel for the Crown does not proceed beyond contending that there can be separate trials for the identical acts of the accused for several offences made out by thoseacts even though the Court who tried the previous case was competent to try the accused for the offence for which the subsequent prosecution had been launched. Such a contention, in my judgment, is directly contradictory to the principles enunciated and enacted in sub-S. (4) of S. 403. Sub-S. (4) has no doubt been worded in the form of an exceptional clause which reads:

"A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

[5] The sub-section has been enacted in an enabling form providing that a man can be tried for a second time for another offence arising out of the same identical acts for which he has already been tried where the latter tried would not have been competently held by the previous Court. If the section intended not to prohibit multiplicity of prosecution for different offences

arising out of the same identical acts, this sub-section should be completely redundant.

[6] I had on a previous occasion to consider this point in 1946 P. W. N. 169[1] of which the facts were almost similar. As at present advised, I am not inclined to take a different view from the one I have taken in the previous case. Mr. Prem Lall cited to me a decision of the Division Bench of this Court in 5 Pat. 452[2] and contends that the decision in that case runs counter to the view that I have already taken in the previous case and that I propose to take in this case. Had that been so, I should have no hesitation in changing my view, but the case cited does not throw any light on the principle which is applicable to the facts of the present case. In that case, the second trial proceeded for the very same offence for which the first trial had been held. The first trial had become infructuous on account of the want of sanction, and, therefore, the Court that tried the offence was held incompetent within the meaning of sub-s. (1) of S. 403. The first trial and the order of the acquittal constituted no bar to the second trial of the same offence inasmuch as the previous trial had been conducted by a Court incompetent to try. The present case is completely different on facts in the sense that the present offence for which the petitioner has been tried and convicted was within the competence of the previous Court to try though the other offences with which he had been charged in that case could not be tried for want of sanction. This decision may support the learned counsel in his contention that the case is not governed by sub-S. (1) of S.403. I, however, do not base my conclusion on that sub-section. I rely on sub-S. (4) of S. 403 and on general principles of law as I have pointed out in the previous decision of mine. In my judgment, therfore, the conviction of the petitioner must be quashed and the sentence passed set aside. The rule is made absolute. The fines, if paid, must be refunded.

R.G D. *Conviction quashed and sentence set aside.*

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**A. I. R. (35) 1948 Patna 33** *[C. N. 14.]*

DAS J.

*Bisesar Pathak and another — Appellants* v. *Phaguni Mahton — Respondent.*

Appeal No. 1412 of 1946, Decided on 30-4-1947, from appellate decree of 3rd Sub-Judge, Gaya, D/- 12-4-1946.

**(a) Civil P. C. (1908), S. 11 and O. 9, R. 13—Withdrawal of application under O. 9, R. 13 — Subsequent suit to set aside ex parte decree on ground of fraud—Maintainability.**

Where an application under O. 9, R. 13 is allowed to be withdrawn without any adjudication, a subsequent suit to set aside the *ex parte* decree on the ground of fraud independent of and not merely confined to the service of summons is not barred by *res-judicata*, as such a question is beyond the scope and purview of O. 9, R. 13, 8 A. I. R. 1921 Pat. 12 ; 11 A. I. R. 1924 Pat. 238, *Disting.*; 28 Cal. 475 (P. C.). and 29 Cal. 395 (P. C.), *Rel. on.* [Para 2]

**Annotation :**— ('44-Com.) Civil P. C., S. 11 N. 19 Pts. 9 to 11; O. 9, R. 13 N. 12 Pts. 11 to 13.

**(b) Evidence Act (1872), S. 102—Decree—Setting aside of, on ground of fraud—Onus of proof—Civil P. C. (1908), O. 9, R. 13.**

In a case to set aside a decree on the ground of fraud, the plaintiff has got to establish that there was non-service of the processes upon him, and that the non-service was the result of active fraud in the former action. [Para 3]

Where, however, the Court considers the evidence of both parties and accepts the evidence given on behalf of the plaintiff and disbelieves the evidence given on behalf of the defendant, the question of onus becomes academic and misdirection as to onus does not vitiate the finding: 24 A. I. R. 1937 Pat. 384, *Disting.* [Para 3]

**Annotation:**—('44-Com.) C. P. C., O. 9, R. 13 N. 12, Pt. 7.

**(c) Civil P. C. (1908), O. 9, R. 13—Ex parte decree—Setting aside of, in subsequent suit—Effect.**

The question whether, on setting aside an *ex parte* decree in a subsequent suit, the suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. When the claim of the plaintiff in the original suit is dealt with only incidentally, the effect of setting aside the *ex parte* decree passed in that suit is to relegate the parties to their former position and in such a case the suit should be restored and the plaintiff's claim inquired into and disposed of in accordance with law: 18 A.I.R. 1931 Pat. 204 (F.B.), *Foll.* [Para 4]

**Annotation:**— ('44-Com.) C. P. C., O. 9 R. 13 N. 25, Pts. 1 and 2.

*Cases referred :*—

1. ('21) 6 Pat. L. J. 1 : 8 A.I.R. 1921 Pat. 12 : 60 I. C. 124, Jangal Choudhry v. Laljit Prasad.
2. ('23) 2 Pat. 833 : 11 A. I. R. 1924 Pat. 238 : 74 I. C. 825, Ramrup Goshain v. Mahabir Shah.
3. ('01) 28 Cal. 475 (P. C.), Radha Raman Shaha v. Pran Nath.
4. ('02) 29 Cal. 395 : 29 I. A. 99 (P.C), Khagendra Nath v. Pran Nath.
5. ('37) 24 A. I. R. 1937 Pat. 384 : 170 I. C. 146, Badri Narain v. Parsoti Pashan.
6. ('31) 12 P. L. T. 493 : 18 A. I. R. 1931 Pat. 204 : 10 Pat. 516 : 132, I. C. 352 (F. B.), Nirsan Singh v. Kishuni Singh.

*R. S. Chatterji and A. K. Chatterji* — for Appellants.

*G. P. Das*—for Respondent.

**Judgment.**—This is an appeal by the defendants from a decision of the learned subordinate Judge of Gaya dated 12-4-1946, by which the learned Subordinte Judge reversed the decision of the learned Munsif of Aurangabad, dated 30-11-1944. The facts so far as they are material for the purpose of this appeal are the following. It appears that there was a dispute between the plaintiff of this suit on one side and defendants 1 and 2 of this suit on the other regarding 4 bighas 19 kathas of land. Both parties claimed to have taken settlement of the

lands from the Ranis of Deo. As a result of the dispute, there was, firstly, a proceeding under S. 144, Criminal P. C., and then, another under S. 145, Criminal P. C. This proceeding under S. 145, Criminal P. C., terminated in favour of the plaintiff of the present suit. Defendants 1 and 2 then filed a title suit, bearing NO. 221 of 1940, for a declaration of their title to and recovery of possession of the lands which, according to them, were bakasht lands. This title suit NO. 221 of 1940, resulted in an *ex parte* decree. The suit was brought on 23-11-1940, and decree *ex parte* on 21-1-1941, that is, within about two months of the filing of the suit. Summonses were ordered to be issued in that suit on 28-11-1940, and were alleged to have been served on 10-12-1940. It appears that the plaintiff of the present suit filed a petition under O. 9, R. 13, Civil P. C., for setting aside the *ex parte* decree. This petition was, however, withdrawn on 12-7-1941. Thereafter, the plaintiff-respondent filed the present suit out of which this appeal has arisen, for setting aside the *ex parte* decree passed in Title Suit NO. 221 of 1940 on the grounds that the *ex parte* decree obtained in Title suit NO. 221 of 1940 was tainted with fraud, and that the plaintiff-respondent was kept out of knowledge of the suit by the fraud committed by the defendants-appellants, who brought the court peon in collusion as part of the fraud practised by them. The learned Munsif, who heard the suit in the first instance, found that the plaintiff-respondent had failed to prove fraud and collusion. He, therefore, dismissed the suit. In appeal, the learned Subordinate Judge has, firstly, found that processes had been suppressed in Title Suit NO. 221 of 1940, and secondly, that the suppression of the processes was the result of active fraud committed by the appellants who had taken all steps to keep the plaintiff-respondent out of knowledge of the suit. The learned Subordinate Judge has found that *ex parte* decree passed in Title Suit NO. 221 of 1940, was the result of active fraud perpetrated by the appellants, and he has, therefore, set aside the *ex parte* decree passed in Title Suit NO. 221 of 1940.

[2] In the appeal before me it has been contended that the withdrawal of the application under O. 9, R. 13, Civil P. C, filed by the plaintiff-respondent, amounted to a dismissal of the application, and that such dismissal operated as *res judicata* in the subsequent suit. Learned conusel for the appellants has relied on two decisions of this Court: 6 Pat. L. J. 1[1] and 2 Pat. 833.[2] In both those cases there was an application to set aside the *ex parte* decree on the ground of a fraudulent suppression of summonses, and the application was heard and dismissed on merits. In those circumstances, it was held that as the question of fraudulent suppression of processes had already been agitated between the same parties and decided by a Court of competent jurisdiction the matter was *res judicata*, and could not again be re-opened between the same parties. I am unable to hold that the principle laid down in those two decisions applies in the present case. Firstly, there was no decision on merits in the present case. Though the plaintiff-respondent had filed an application under O. 9, R. 13, Civil P. C., he was permitted to withdraw the application without any adjudication. It may be conceded that the principle of *res judicata* may, in some circumstances, arise even when a suit or proceeding is dismissed for default; but, a case in which the application is allowed to be withdrawn without any adjudication whatsoever hardly attracts the principle of *res judicata*. For example, the plaintiff-respondent may have been advised that the question of fraud which he wished to be agitated did not relate merely to the service of summons; it was independent of and more than a mere attack on the regularity of the service of the summons, and such a question would be beyond the scope and purview of an application under O. 9, R. 13, Civil P. C. If under such advice, the plaintiff-respondent withdraw his application under O. 9, R. 13, Civil P. C., it cannot be said that the subsequent suit brought by the plaintiff-respondent on the ground of fraud would be barred on the principle of *res judicata*. Even if the Court before which the application under O. 9 R. 13, Civil P. C. had, been filed, had decided the application on merits, it could only have decided the question which arose under O. 9, R. 13 Civil P. C namely, that the summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. The Court could not decide the more radical question, namely, that there was fraud, independent of, and not merely confined to the service of summons in the suit. Therefore, a decision given by the Court on the application under O. 9, R. 13, Civil P. C, could not have operated as *res judicata* on the more radical question of fraud, because such a question would have been beyond the scope and purview of an application under O. 9, R. 13, Civil P. C. There are, indeed, some decisions which have laid down that if the fraud alleged is confined to the service of summons and is not independent of that service, the finding arrived at on an application under O. 9, R. 13, Civil P. C., will operate as *res judicata* in a subsequent suit for setting aside the *ex parte* decree on that very ground. The two decisions in 6. Pat. L. J. 1[1] and 2 Pat. 833[2] support that view.

But in the case before me, the fraud found by the Court of appeal below was not confined merely to the service of the summons. The plaint of the suit has been placed before me by learned counsel for the appellants. In paras 5 and 6 of the plaint there are clear allegations to the effect that there was fraud independent of the service of the summons. The allegations are to the effect that the appellants wished to keep the plaintiff-respondent out of knowledge of the suit so that the respondent, though he was in possession of lands and had a good prima facie title might not contest the suit brought by the appellants. The Court of appeal below has found that the respondent was in possession of the lands, and had a good prima facie title. The Court of appeal below has also considered other particulars in connection with the question of fraud, and has arrived at the finding that there was fraud which was not confined merely to the service of the summons: the suppression of summons was merely a part of the general fraudulent design on the part of the appellants to keep the respondent out of knowledge of the suit so as to snatch an *ex parte* decree on a doubtful claim. That being the position, the respondent could bring an action for setting aside the *ex parte* decree on the ground of fraud, and any decision given on an application under O. 9, R. 13, Civil P. C., would not have stood in the way of the maintainability of such a suit. If authority be needed for this, it would be found in the decisions of their Lordships of the Judicial Committe in 28 Cal 475[3] and 29 Cal. 395.[4] I am, therefore, of the opinion that the withdrawal of the application under O. 9, R. 13, Civil P. C., does not affect the maintainability of the subsequent suit brought by the respondent; such a suit on the ground of fraud was maintainable, and no question of *res judicata* arises.

[3] The second point which has been urged before me on behalf of the appellant is that the learned Subordinate Judge had misdirected himself on the question of onus. It is true that the learned Subordinate Judge has mentioned in one place of his judgment that on the denial of the plaintiff-respondent that he had received the summons, the onus shifted to the appellants to prove affirmatively that summonses had been served in Title Suit No. 221 of 1940. The learned Subordinate Judge may not have been quite right in that view. In a case to set aside a decree on the ground of fraud, the plaintiff has got to establish that there was non-service of the processes upon him, and that the non-service was the result of active fraud in the former action. The learned Subordinate Judge has, however, considered the evidence in detail, and on a consideration of that evidence he has come to the finding that summonses had not been served on the respondent in the former suit and the non-service was the result of active fraud committed by the appellants in the former action. Learned counsel for the appellants has referred me to the decision in A. I. R. 1937 Pat. 384[5] That was however a case in which the Court had disbelieved the witnesses of the plaintiff as well as of the defendant. It was pointed out that having disbelieved the plaintiff's witnesses upon whom the onus lay, the Court should have drawn the conclusion that the plaintiff had failed to establish that fact which it was necessary for him to establish, if the question of the merits of the original suit was not to be investigated. In those circumstances, it was observed that the Court below had misdirected itself on the question of onus, which had affected the finding of the Court of appeal below. Here, however, the learned Subordinate Judge has considered the evidence of both parties, and he had accepted the evidence given on behalf of the respondent and disbelieved the evidence given on behalf of the appellants. That being the position, the question of onus was really academic, and has not, in any way, vitiated the finding arrived at by the Court of appeal below.

[4] Lastly, it has been pointed out to me that the Court of appeal below should, at least, have passed an order reviving Title Suit No. 221 of 1940 in which the *ex parte* decree was passed The effect of setting aside an *ex parte* decree in a subsequent suit was considered by a Full Bench of this Court in 12 P. L. T. 493[6], and it was pointed out that the question whether the original suit in which that decree was obtained, is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. It is clear from the judgment of the learned Sudordinate Judge that he has gone into the claim of the plaintiff in the original suit only incidentally, for the purpose of holding that there was a motive to obtain stealthily a decree behind the back of the defendants of that suit Where the claim of the plaintiff in the original suit is dealt with only incidentally, the effect of setting aside the *ex parte* decree passed in that suit is to relegate the parties to the former position, and, in such a case, the suit should be restored, and the plaintiff's claim enquired into and disposed of in accordance with law. In my opinion, that should be the proper order in the present case also. I would, therefore, allow the appeal to the extent that the *ex parte* decree passed in Title Suit No. 221 of 1940 should be set aside, that the said suit be restored, the parties relegated to their former position, and the claim of the plaintiffs of that suit should now be enquired into and disposed of in accordance with law. In the circumstances of this case there

will be no order for costs of the hearing in this Court. The order for costs, as passed by the Court of appeal below, will stand.

G.J./D.H. *Appeal partly allowed.*

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## A. I. R. (35) 1948 Patna 36 *[C. N. 15.]*

MEREDITH J.

*Governor-General in Council— Defendant —Petitioner* v. *Joynarain Ritolia—Plaintiff —Opposite Party.*

Civil Revn. No. 745 of 1945, Decided on 30-4-1947, from order of Sm. C. C. Judge, Dhanbad, D/-18-5-1946.

**(a) Sale of Goods Act (1930), S. 25—Goods consigned to self—Passing of property in the goods.**

Where goods are sent by Railway the consignment being made to self, the property in the goods does not pass to the buyer on delivery of the goods to the Railway Company as carrier. The seller, therefore, when he enters into the contract with the railway company is not, in such a case, acting as the buyer's agent and the buyer cannot be considered to be the original party to the contract with the railway company: 14 A. I. R. 1927 Lah. 269; 25 A. I. R. 1938 Sind 18 and 10 A. I. R. 1923 Bom. 125, *Rel. on.* [Paras 7 and 8]

**(b) Transfer of Property Act (1882), Ss. 130 and 137—Railway receipt endorsed in blank and delivered to transferee—Rights of the transferee.**

The contract indicated by a railway receipt can be transferred without a writing, the form or method of transfer being regulated by custom. The transfer can be made even by endorsement in blank coupled with delivery of the document to the transferee, provided the intention is to make an absolute delivery carrying with it a right to goods.

Where the railway receipt is handed over on payment of the price of the goods, clearly there is an absolute transfer both of the goods and of the right to take delivery under the contract: *Case law referred.* [Para 10]

**(c) Railways Act (1890), S. 72— Misconduct—Proof of—Evidence Act (1872), S. 106.**

In a suit for loss of goods against a railway company it is open to the plaintiff to establish misconduct by an inference from the railway company's disclosure as to how the consignment had been dealt with as required under Risk Note B. [Para 4]

*Cases referred*:—

1. ('45) 32 A. I. R. 1945 Pat. 387.
2. ('24) 11 A. I. R. 1924 Mad. 517 : 73 I. C. 537.
3. (1799) 101 E. R. 1417.
4. ('38) 25 A. I. R. 1938 Sind 18 : 173 I. C. 535.
5. ('23) 10 A. I. R. 1923 Bom. 125 : 70 I. C. 138.
6. ('27) 14 A. I. R. 1927 Lah. 269 : 100 I. C. 795.
7. ('14) 38 Bom. 659 : 1 A. I. R. 1914 Bom. 178 : 25 I. C. 380.
8. ('24) 46 All. 691 : 11 A. I. R. 1924 All. 574 : 82 I. C. 351.
9. ('38) 65 I. A. 75 : 25 A. I. R. 1938 P. C. 52 : I. L. R (1938) Mad. 316 : 32 S. L. R. 313 : 172 I. C. 745 (P.C.)
10. ('34) 61 I. A. 416 : 21 A. I. R. 1934 P. C. 246 : 58 Mad. 181 : 152 I. C. 730 (P. C.).
11. ('16) 43 I. A. 164 : 3 A. I. R. 1916 P. C. 7 : 40 Bom. 630 : 35 I. C. 954 (P. C.).

*S. N. Bose and Nitai Chandra Ghosh*— for Petitioner.

*A. C. Roy* — for Opposite Party.

**Order.**—This is an application under S. 25, Small Cause Courts Act by the Governor-General in Council representing the East Indian Railway Administration and the G. I. P. Railway Administration as defendant in a suit in the Court of the Small Cause Court Judge at Dhanbad for recovery of Rs. 406 in respect of the loss of 14 tins of vegetable *ghee* out of a consignment of 1200 tins.

[2] The consignment of 1200 tins was booked at Sion station on the G. I. P. Railway to Dhanbad on the East Indian Railway by the Vegetable Vitamin Food Co., Limited. The consignment was made to self, and Risk Notes A and B were executed. The consignor endorsed the railway receipt in blank on the back, and transferred it to Messrs. Mohammad Ibrahim Mohammad Zaffar & Company. The plaintiff, whose joint family trades under the name of Sheosamal Mansaram, purchased the railway receipt and the goods from Mohammad Ibrahim Mohammad Zaffar, who in their turn endorsed the railway receipt in blank and made it over to the plaintiff. The plaintiff then took delivery through his servent, and 14 tins were found short.

[3] Two points were taken in defence before the learned Judge, and have also been taken before me. First, it is said that the plaintiff being neither the consignor nor the consignee, nor an endorsee of the railway receipt, has no right to sue. Reliance is placed on a decision of Beevor J. in *Sri Ram Krishna Mills, Ltd.* v. *Governor-General in Council* (A. I. R. 1945 Pat 387[1]) wherein it was held that where goods have been delivered to the railway company for consignment, it is only the consignee or the persons to whom the railway receipt has been endorsed who can sue for non-delivery of the goods. Reliance is further placed on an unreported decision of Agarwala A. C. J. (Civil Revision No. 141 of 1946) decided on 2nd April 1947, in which it was held that the plaintiff had no right to sue, because the consignment had been made to self and although the plaintiff was (in possession?) of the railway receipt it bore no endorsement in his favour.

[4] The second point is that misconduct on the part of the Railway Administration was not established as required under the Risk Notes. There is nothing in this second point, as the learned Judge has held upon the evidence that misconduct was established and that the goods had been pilfered either by railway servants or by some one with the connivance of the railway servants. The learned Judge was fully entitled to come to this conclusion, and it cannot be interfered with in revision. Even if he based his conclusion on an inference from the defendant's evidence and the circumstances disclosed therein, rather than on any positive evidence adduced by the plaintiff, that makes no diffe-

ence. It is open to the plaintiff to establish misconduct by an inference from the railway company's disclosure as to how the consignment had been dealt with as required under Risk Note B.

[5] The first point, however, needs very careful consideration. The action being on contract, the plaintiff must show that he had become privy to the contract. This could be done in two ways, either by showing that he should be deemed an original party to the contract, or by showing that the rights under the contract had passed to him either by assignment or by operation of law.

[6] Let us consider first whether the consignor can be said to have made the contract as agent of the plaintiff so as to make the plaintiff a party to the contract. This will depend on when the legal property in the goods passed to the plaintiff. If the property passed to the plaintiff on delivery to the railway company as carrier, then the consignor will be deemed to have contracted with the Railway Administration as agent of the purchaser, that is, the plaintiff. If the property had passed from the vendor on delivery to carrier then the vendor sustains no loss by the non-delivery, and obviously cannot sue. He has no cause of action : M. S. M. Ry. Co. Ltd. v. Rangaswamy Chetty (A.I.R. 1924 Mad. 517.[2]) See also Dawes v. Peck (1799 101 E. R. 1417.[3]) If the consignor of goods delivers them to a particular carrier by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods; the action can only be brought by the consignee. Lord Kenyon, Ch. J. said:

"The question must be governed by the consideration in whom the legal right was vested, for he is the person who has sustained the loss, if any, by the negligence of the carrier and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured."

The position in India is now governed by the Indian Sale of Goods Act, 1930. Under S. 23 (1) of that Act:

"Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

Under sub-section (2)

"Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Therefore, unless there is something in the terms of the contract to show a contrary intention when the seller delivers the goods to the carrier for transmission to the buyer the property passes to the buyer, and the contract would be deemed to have been made as agent of the buyer. Nor does the fact that the seller intimates that he will not deliver, or refuses to deliver, except on payment of the price, of itself displace the presumption; for the right of the seller to retain possession of the goods until payment is quite consistent with the change of property. Obviously too once the property has passed to the buyer he can have no right of action against the seller for anything subsequenty happening to it. The loss is his, and his remedy if any, is against the railway company.

[7] The position is, however, different where the consignment is to self. Under S. 25 (1) the seller may reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to the buyer, or to a carrier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer, until the conditions imposed by the seller are fulfilled; and under sub-S. (2) where goods are shipped and by the Bill of Lading the goods are deliverable to the (order of the?) seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal. Though this provision is expressed as relating to the shipment of goods, the same principle will apply to their transmission by rail; see Ugarchand v. Motiram (A.I.R. 1938 Sind, 18[4]), Ford Automobiles (India) Ltd. v. Delhi Motor and Engineering Co. (A I R. 1923 Bom 125)[5] and Sundar Sing v. Gulab Singh (A I.R. 1927 Lah. 269.)[6] In the last-mentioned case it was held that where goods are sent by railway, the railway receipt being addressed to self to be delivered to the purchaser only on receipt of the price of the goods, the property in the goods does not pass to the purchaser till the price is paid.

[8] It is clear that if the property in the goods has not passed to the buyer, the seller when he enters into the contract with the Railway Administration cannot be acting as the buyer's agent. In the present case, therefore, the plaintiff was not an original party to the contract.

[9] There remains the question whether the contract had passed to him. I have already cited decisions where it has been held that an endorsee of the railway receipt has sufficient interest in the goods to maintain a suit against the Railway administration. Other cases are Dolatram Dwarkadas v. B B. & C.I. Ry. Co. (38 Bom. 659[7]) and Piari Lal Gopi Nath v. E. I. Ry. Co. (46 ALL. 691[8]). Therefore, the question merely is whether if an endorsement in favour of the buyer coupled with transfer of the railway receipt to him as owner of the goods operates as an assignment of the contract, will it make any difference if the

endorsement in blank? In my opinion, it will not. Under S. 2 (4), Sale of Goods Act, a railway receipt is a document of title to goods. The same has been held by the Privy Council in several cases, *Mercantile Bank of India, Ltd.* v. *Central Bank of India* (65 I. A. 75[9]). *Official Assignee of Madras* v. *Mercantile Bank of India, Ltd.* (61 I. A 416[10]) and *Ramdas Vithaldas* v. *Amerchand & Co.* (43 I. A. 164[11]). Moreover, if a railway receipt is not a negotiable instrument. Strictly speaking (*Mercantile Bank of Indian, Ltd.* v. *Central Bank of India, Ltd.* 65 I. A. 75[9], at p. 91,) it is still certainly negotiable after endorsement. In 61 I. A. 416[10] and 65 I. A. 75[9], it was held that a pledge of the railway receipt operates as a pledge of the goods in transit giving the pledgee a right to take delivery: *Official Assignee of Madras* v. *Mercantile Bank of India, Ltd.* (61 I. A. 416[10]), was a case where the endorsement was in blank.

[10] Under S. 130, T. P. Act, the transfer of an actionable claim can be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent. But under S. 137, this does not apply to instruments which are for the time being by law or custom negotiable, or to any mercantile document of title to goods, and the expression "mercantile document of title to goods" is defined as including, *inter alia*, a railway receipt The contract indicated by the railway receipt can, therefore, be transferred without a writing, and no particular form or method of transfer has been prescribed by law. It will be regulated by custom. I see no reason, therefore, why such a transfer should not be made by endorsement in blank coupled with delivery of the document to the transferee. Of course, the intention must be to make an absolute delivery carrying with it a right to the goods. The railway receipt might be handed over only for a limited purpose. Here again, *see Mercantile Bank of India, Limited* v. *Central Bank of India, Limited*, (65 I.A. 75[9]). But in a case where the railway receipt is handed over on payment of the price of the goods, as is the common practice under the V. P. P. system, and as happened in the present case, clearly there has been an absolute transfer both of the goods and of the right to take delivery under contract. Also it is clear that the property in the goods under the contract of sale passes to the buyer directly the latter pays the price and the railway receipt endorsed in blank is delivered to him.

[11] It is unnecessary for me to express any opinion as to the position which would arise should the railway receipt be transferred to the buyer for value without endorsement. Probably if the railway company chooses to make delivery to the buyer without any endorsement on the railway receipt by the consignee (that is, the consignor), then the railway company would not be heard to say that the buyer is not entitled to sue, because by making delivery the railway company has accepted the plaintiff as a transferee in interest of the contract together with the goods. But I must not be taken to have expressed any final opinion on this point, which does not arise in the present case.

[12] In the result both points argued fail. It must be held that the learned Small Cause Court Judge rightly decreed the suit. This application, is, therefore, dismissed with costs, hearing fee three gold *mohurs*.

D.H. *Revision dismissed.*

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## A. I. R. (35) 1948 Patna 38 *[C. N. 16.]*

BENNETT AND BEEVOR JJ.

*Suryamohan Thakur—Appellant* v. *Arjun Rai and others—Respondents.*

Appeals Nos. 628, 1129 and 1130 of 1945, Decided on 24-4-1947, from appellate decree of Addl. Dist. Judge, Bhagalpur, D/-24-5-1945.

**(a) Bihar Tenancy Act (8 [VIII] of 1885), Ss. 3 (9) and 22 (2)—Land held by co-sharer landlord under S. 22 (2), if "holding."**

A co-sharer landlord holding land under S. 22 (2) is not a raiyat and, therefore, the land while held by him is not a 'holding'. [Para 7]

**(b) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act. (9 [IX] of 1938), Ss. 11 and 10 (b)—Persons dispossessed by delivery of possession under S. 8 (2) restored to possession under S. 11—Effect.**

When a person dispossessed by delivery of possession under S. 8 (2) is restored to possession under S. 11 of the Act, the effect is that only a part of the holding or portion sold is to be restored to the raiyat according to the directions of the Collector, and thus, in such circumstances, S. 10 (b) relating to the determination of rent payable by the raiyat for the portion of the holding will come into operation. [Para 11]

**(c)Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 [IX] of 1938), S. 10(b) —"Landlord", meaning of—Raiyat dispossessed by auction-purchaser co-sharer-landlord in execution of rent decree restored to possession under Act—Right of co-sharer landlord to recover entire rent of holding.**

The definition of "landlord" as given in S. 3 (4), Bihar Tenancy Act which by virtue of S. 2, of the Bihar Act, IX of 1938 applies also to the expression as used in the latter Act, applies to each individual of a number of co-sharer proprietors or tenure-holders immediately under whom as a body the tenant holds. The expression "landord" used in S. 10 (b) of Bihar Act. IX of 1938 refers to the co-sharer landlord who purchased the original holding and subsequently held it under S. 22 (2), Bihar Tenancy Act until proceedings under Bihar Act IX of 1938 were taken. [Paras 12, 13, 14]

Hence when a raiyat is restored to possession of a holding under the provisions of Bihar Act, IX of 1938, from which holding he had previously been dispossessed by an auction-purchaser of a co-sharer landlord in execution of his decree for rent, the raiyat upon such

**restoration becomes the tenant of the auction-purchaser co-sharer landlord only and the latter alone is entitled to realise the entire rent of the holding from the raiyat.** [Para 28]

**(d) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 [IX] of 1938), S. 12 (b)—Revival of incidents of tenancy if involves identity of persons to whom rent was payable before sale of holding.**

**The identity or even the number of the person or persons to whom rent is payable is not itself an incident of the tenancy, and, therefore, the revival of the incidents of the tenancy under S 12 (b) does not necessarily involve that the rent shall be payable to the entire body of landlords to whom the rent was payable before the original holding was sold.** [Para 17]

*J. M. Ghosh*—for Appellant.

*Government Pleader*—for Respondents.

**Beevor J.**—These three appeals have been filed by the same person who was plaintiff in three rent suits. They all raise questions regarding the interpretation of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (Bihar Act IX of 1938), but the question raised in second Appeal 628 is slightly different from that raised in the other two appeals. The respondents have not appeared in any of the appeals, but at the request of the Court the Government Pleader has appeared as *amicus curiae* in second appeal NO. 628 with which it will be convenient to deal first.

[2] In this appeal NO. 628 the plaintiff-appellant holds a six anna ten pies share in the village in which the rent-claimed lands are situated. The holding previously consisted of 4. 21 acres of land held by defendants 1 and 2 under the 16 annas proprietors of the village, but, in execution of a decree for rent, the plaintiff-appellant brought the holding to sale and purchased it himself and obtained possession some time before the Bihar Act, IX of 1938 came into force. At this stage the plaintiff-appellant was holding the entire land of the original holding under the provisions of S. 22 (2), Bihar Tenancy Act The appellant then settled 1. 54 acres of land with Kamleshwari Prasad Chaudhuri, defendant-respondent 3, who thereupon became a raiyat of that area as a separate holding.

[3] This was the position when Bihar Act IX of 1938 came into force. The Act is described in the preamble as an Act to provide for the restoration of certain lands to the former tenants thereof and the reduction of arrears of rent in certain cases. Section 3 of the Act provides for applications by raiyats whose holdings or portions of whose holdings were sold between 1-11-1929 and 31-12-1937, in execution of a decree for arrears of rent and were purchased by the landlord of such holding where such holdings or portions were under the possession or control of the said landlord. An application was accordingly made by defendants 1 and 2, and on 27-2-40 an order was passed by the Revenue Officer exercising powers of Collector for restoration to these defendants the possession of the entire holding, and delivery of possession was given in accordance with that order on 22-4-40. In the meantime, on 19-4-40, an order had been passed for reduction of the rent of the holding from RS. 37-8 to RS. 25-8 under the provisions of S. 112A, Bihar Tenancy Act. It is clear that on the delivery of possession objection was taken by defendant 3 which was evidently under S. 11 of Act IX of 1938 and thereafter on 24-5-1940 a revised order was passed by the Revenue Officer for restoration of defendants 1 and 2 to possession of 2.67 acres of land excluding the 1. 54 acres belonging to defendant 3. In the same order the Revenue Officer fixed the rental in respect of the 2.67 acres of land restored to defendants 1 and 2 at RS. 18-15.

[4] The appellant brought the suit out of which this appeal arises for rent for the years 1347 to 1350 Fasli against defendants 1 and 2 claiming the entire rent at the unreduced figure of RS. 37-8. Defendant 3 appeared in the trial Court as an intervenor defendant and claimed that a portion of the land was in his possession though defendants 1 and 2 claimed possession of the whole. The trial Court accepted the case of defendant 3 regarding possession, but held that the rent had been reduced to RS. 25-8 with effect from 1347 Fasli, and further held that the plaintiff was only entitled to that share of the rent corresponding to his 6 anna 10 pies share in the village, and gave a decree for rent in respect of the entire original holding laying down in his judgment that defendants 1 and 2 would be liable for the rent up to 24-5-1940 and that after that date they and defendant 3 would be jointly and severally liable. An appeal against that decision was dismissed by the Additional District Judge of Bhagalpur.

[5] In the memorandum of appeal to this Court it was urged that two holdings had come into exsitence and that the decree should be confined to the holding in possession of defendants 1 and 2. In argument, Mr. Jotirmoy Ghosh appearing for the appellant stated that his client was prepared to accept the figure of RS. 18-15 as the rental payable by defendants 1 and 2 for the holding consisting of the 2.67 acres of land restored to their possession under Act IX of 1938 by the order dated 24-5-1940.

[6] The main question which has been argued before us is the question whether after the order for restoration dated 24-5-1940 the plaintiff-appellant was entitled to recover from defendants 1 and 2 the entire rental of RS. 18-15 or whether he was entitled only to a share of that rental proportionate to his 6 annas 10 pies share in

the village. Before considering this question, however, it is necessary to clear up certain points on which the lower Courts have fallen into error.

[7] Under 3 (9), Bihar Tenancy Act "holding" means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. Section 22 (2) provides that:

"If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat, as the case may be, in respect of the land."

The co-sharer landlord holding land under S. 22 (2) is not a raiyat and, therefore, the land while held by him is not a holding. It follows that when the plaintiff-appellant settled 1.54 acres of land with defendant 3 he became a raiyat in respect of that land and that area formed a new raiyati holding. It is not suggested that the settlement with defendant 3 was other than *bona fide*, and nothing in Act IX of 1938 suggests that there was any intention to restore lands so settled to the original raiyat. On the contrary, S. 11 read with S. 6 (1) (d) of the Act makes it clear that if the person, who has taken such a settlement, is in fact dispossessed by proceedings under this Act he may recover possession. I shall refer to these sections in greater detail at a later stage. It follows, therefore, that whatever area was restored to the possession of defendants 1 and 2 under Act IX of 1938 was not the original holding which ceased to exist from the time the present plaintiff-appellant started to hold it under S. 22 (2), Bihar Tenancy Act. It is also quite clear that defendants 1 and 2 have nothing to do with the holding of defendant 3 consisting of 1.54 acres of land settled with him by the plaintiff-appellant Whatever, therefore, was restored to the possession of defendants 1 and 2 under Act IX of 1938 would form the subject-matter of a separate holding. It is undisputed, and S. 12 of Act IX of 1938 also makes it clear, that after restoration defendants 1 and 2 were raiyats in respect of the land restored to them under the Act.

[8] It follows, therefore, that any claim which the plaintiff-appellant may have for rent against defendant 3 is based on an entirely different cause of action from any such claim against defendants 1 and 2. The appellant is, therefore, entitled to a decree for rent as against defendants 1 and 2 alone for the holding of 2.67 acres of land from 24-5-1940, the rental for the entire area being Rs. 18-15 and cess being payable thereon at 6 pies in the rupee. The only further question in this appeal is whether the plaintiff-appellant is entitled to recover the whole of that rental or only a share thereof proportionate to his 6 annas 10 pies share in the village.

[9] I will first summarise the provisions of Act IX of 1938 which are directly applicable to the restoration proceedings which have taken place in this case. Section 3 defines the persons who are entitled to apply, and provides for the form of the application and the period of limitation for its presentation. Among the particulars required to be entered in the application is "the name of the landlord of the holding by whom it was purchased." Section 4 provides for amendment of applications and rejection of defective applications. Section 5 provides for notice to the landlord named in the application. Section 6 (1) sets out the grounds on which the landlord may object to the application. Of these, we are now only concerned with S. 6 (1) (d):

"that the holding mentioned in the application or any portion thereof is in the possession of a third person, and that such third person is in possession of the holding or such portion on his own behalf or on behalf of some person other than the landlord under a settlement which, in the case of a holding or portion of a holding sold before the first day of January 1937, was made in good faith by such landlord before the twenty-second day of March 1938, or which, in the case of a holding or portion of a holding sold between the first day of January 1937, and the thirty-first day of December 1937, was made in good faith by such landlord before the nineteenth day of April 1938."

Section 6 (2) directs that the Collector shall make enquiry, and prescribes the form of order to be passed according to the different possible findings made by him. Here again we are concerned only with S. 6 (2) (d) which prescribes that if the Collector decides

"that such third person is in possession on his own behalf or on behalf of some person other than the landlord under a settlement mentioned in cl. (d) of sub s. (1): (i) of the entire holding or portion sold, he shall dismiss the application; (ii) of a part of such holding or portion, he shall reject the application in so far as it relates to such part. and order that the application shall proceed with respect to the remaining part of the holding or portion: Provided that no order under this clause shall be made unless the Collector has given notice of the application to such third person."

Section 8 directs the Collector to determine the land which is liable to be restored to the raiyat under the provisions of the Act, to determine the amount which shall be payable by the raiyat for the restoration to him of such land, to determine the manner of payment, and to order the raiyat to be put in possession. Section 9 prescribes the extent of the land to be restored to the raiyat in varying circumstances. Sections 10, 11 and 12 have an important bearing on the question now before us and are, therefore, set out in full:

"*10.* When the Collector directs under any of the provisions of this Act, that only a part of the holding or portion sold shall be restored to the raiyat, he shall,

(a) if the raiyat and the landlord of such holding do not agree as regards the specific plots to be restored, determine the plots which shall be restored to the raiyat; and

(b) determine the rent which shall be payable by the raiyat for such portion of the holding, and the raiyat shall be liable to pay the same to the landlord.

*11* (1) Where a person claiming to be in possession of a holding or portion of a holding as mentioned in cl. (d) sub-s. (1) of S. 6 is dispossessed as a result of any delivery of possession made under sub-s. (2) of S. 8, he may, within two weeks from the date on which he is dispossessed, make an application to the Collector complaining of such dispossession.

(2) Upon the receipt of an application made under sub-section. (1) the Collector shall fix a date for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

(3) If the Collector, after making such inquiry as he thinks fit, is satisfied that the applicant was in possession of the holding or portion as mentioned in cl. (d) sub-s. (1) of S. 6, and had no notice of the proceeding in which the order for delivery of possession was passed, he shall direct that the applicant be put in possession of the said holding or portion.

*12.* Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any custom, when any land is restored to a raiyat under the provisions of this Act,

(a) any simple mortgage or charge created by the landlord in respect of such land or any portion thereof shall not be binding on the raiyat; and

(b) all such rights as the raiyat had in respect of the said land and the incidents thereof before its sale shall revive."

[10] Section 13 provides, subject to certain restrictions, for ejectment of a raiyat who has been restored to possession under the foregoing sections if he fails to keep up the instalments fixed for payment of the amount due to the landlord for restoration. Section 14 allows an additional remedy by way of distraint for arrears of rent falling due during the period while any such instalments remain unpaid. Chapter III of the Act, containing Ss. 15 to 20 deals with reduction of arrears of rent and not with restoration of possession. Chapter IV including Ss. 21 to 25 contains miscellaneous provisions which I need not mention at this stage.

[11] In my opinion it is clear that when a person dispossessed by delivery of possession under Sub-s. (2) of S. 8 is restored to possession under S. 11 of the Act, the effect is that only a part of the holding or portion sold is to be restored to the raiyat according to the directions of the Collector, and thus, in such circumstances, S. 10 (b) relating to the determtnation of rent payable by the raiyat for the portion of the holding will come into operation and this is what has actually happened in this case.

[12] By the order dated 24-5-1940 the Revenue Officer fixed Rs. 18-15-0 as the rent to be payable by defendants 1 and 2 for the portion of their original holding restored to him. The last portion of S. 10 (b) directs regarding such rent that "the raiyat shall be liable to pay the same to the landlord". The critical question in this appeal is what is meant by "the landlord". Is it the whole body of landlords of the original holding or is it the plaintiff who purchased the original holding and subsequently held it under S. 22 (2), Bihar Tenancy Act, until the proceedings were taken under Act, 9 [IX] of 1938?

[13] Section 2 of Act, 9 [IX] of 1938, lays down that in this Act unless there is anything repugnant in the subject or context the expression "landlord" has, in the area with which we are now concerned, the meaning assigned to it in the Bihar Tenancy Act, 1885. In S. 3 (4) of that Act it is laid down that "unless there is something repugnant in the subject or contest "landlord" means a person immediately under whom a tenant holds and includes the Government." This definition will clearly apply to each individual of a number of co-sharer proprietors or tenure-holders immediately under whom as a body the tenant holds.

[14] Section 3 (1) of Act, 9 [IX] of 1938, enabled a raiyat, whose holding was sold within certain specified period in execution of a decree for arrears of rent and was purchased *by the landlord of such holding*, to apply for restoration subject to certain conditions. If in this sub-section the words "the landlord of such holding" were restricted in the case of co-sharer landlords to the entire body of such landlords, I think there can be little doubt that the entire object of the Act would have been largely frustrated. It has not been suggested before us that the Act does not apply where the purchase was made by a cosharer landlord. The fact that it does apply to a purchase by a co-sharer landlord is clearly indicated by S. 3 (2) which requires that the application shall contain (i) "the name of the landlord of the holding by whom it was purchased." The last five words were entirely unnecessary if the Act did not apply to a purchase by a co-sharer landlord. Section 5 directs that notice of the application shall be given to" the landlord named in the application." The next section begins with the words "on the date fixed for the hearing of the application the landlord may appear and object to the application." It seems to me that these words can only apply to the landlord to whom notice has been given that is the auction-purchaser landlord as I will describe the co-sharer landlord who was holding the land under S. 22 (2), Bihar Tenancy Act. If there is any doubt about the interpretation of these words in S. 6 (1) standing by themselves, I think that doubt is immediately removed on a consideration of the grounds which are permitted by that section to be taken in objection to the application for restoration. The grounds allowed by

that section are largely inapplicable to any one but the auction-purchaser landlord.

[15] Section 9 provides for the extent of land to be restored and S. 9 (2) sets out the different portions of the holding which are to be restored according to varying areas of the original holding Section 9 (3) runs as follows :

"Notwithstanding anything to the contrary contained in sub-ss. (1) and (2) where a raiyat is entitled to be restored to the possession of a part of a holding and the area of that part of the holding which is left in the possession or control of the landlord and which is liable to be restored to the raiyat is less than the area to the possession of which the raiyat is entitled to be restored under the provisions of this Act, the raiyat shall be restored to the possession of the entire area of the part left in the possession or control of the landlord and liable to be restored to the raiyat."

It is clear that the words "the landlord" in this sub-section cannot possibly refer to any one but the auction purchaser landlord. Section 13 allows 'the landlord" to make an application to the Collector for the restoration to him of possession where the raiyat makes default in payment of instalments payable in respect of restoration of the land to the raiyat. Again it is clear that the words "the landlord" can refer to no one but the auction-purchaser landlord. Section 14 gives power to the landlord to use an additional remedy by way of distraint for arrears of rent falling due while such instalments are payable. Reading the words of this section without reference to other portions of the Act, it would be possible to construe the words "the landlord" therein as applicable to the whole body of landlords, but no reason has been suggested to us why the Legislature should provide any such additional remedy for any one but the auction-purchaser landlord in the circumstances therein specified.

[16] I might refer to other portions of the Act in which the words "the landlord" are clearly applicable only to the auction purchaser landlord, but I think it is unnecessary to pursue the matter in further details unless it is found that there are definite reasons for thinking that the words "the landlord" are in some instances used with reference to the entire body of landlords in this Act. I have examined the Act from beginning to end, and I have not found a single instance in which it is clear that the words "the landlord" are intended to refer to the entire body of landlords On the other hand, there is one instance in the Act where the Legislature clearly wished to refer to the entire body of landlords. This is in S. 3 (2) (iii) which requires that the raiyat's application shall contain

"a statement whether the rent of the holding was settled, enhanced or commuted at any time after the 1st day of January, 1911 whether by an order of the Court or by an agreement between the raiyat and *his landlord*."

The fact that in this one instance the Legislature has used the words "his landlord" instead of the words "the landlord" in my opinion supports the inference that the latter phrase is restricted to the auction-purchaser landlord.

[17] The learned Government pleader referred to S. 12 (b) of the Act which says that on restoration "all such rights as the raiyat had in respect of the said land and the incidents thereof before its sale shall revive," and he suggested that among the incidents so revived was the liability to pay rent to the entire body of landlords. In my opinion this conclusion is quite unnecessary. The liability to pay rent or perhaps even the liability to pay rent at a particular rate was the incident of the original tenancy, but it is not noticeable that the latter is not fully restored when the raiyat is restored to possession of a part of the holding under this Act because the Collector is given power to determine the rent which shall be payable by the raiyat for such portion, and the Act does not indicate that the rent so determined must necessarily be proportionate to the area restored. In any case it seems to me that the identity or even the number of the person or persons to whom rent is payable is not itself an incident of the tenancy, and, therefore, the revival of the incidents of the tenancy under S. 12 (b) does not necessarily involve that the rent shall be payable to the entire body of landlords to whom the rent was payable before the original holding was sold.

[18] As a result I come to the conclusion that the plaintiff-appellant is entitled to recover from defendants 1 and 2 the entire rent of Rs 18-15-0 with cess thereon at half an anna in the rupee from 24-5-40 in respect of a holding consisting of the 2.67 acres of land which were restored to defendants 1 and 2 under the Revenue Officer's order of 24-5-40, and the appellant should be given a decree against defendants 1 and 2 accordingly, and the decree against them should be modified to this extent and no decree in this suit should be passed against defendant 3.

[19] In the remaining two appeals the plaintiff-appellant was the eight anna co-sharer landlord of the original holdings but purchased them in execution of decrees for arrears of rent and was then holding them under S. 22 (2), Bihar Tenancy Act. The whole holdings were subsequently restored to the possession of the raiyat under the provisions of Bihar Act, IX of 1938 The plaintiff-appellant then brought suits for the entire rent of the holdings. The defence raised two points : first, that the plaintiff was only entitled to eight anna share of the rent, and, secondly, that the rent had been reduced. Both these points were decided in favour of the defence in both cases though the appeals were disposed of

in the lower appellate Court by two different officers. The appellant challenges the decision of the lower Courts on both these points.

[20] Now under Ss. 9 (1) and 9 (2) (a) (i) certain raiyats were entitled to be restored to the possession of the whole of their holdings. There is no section in the Act which deals specifically with the rent payable by such a raiyat after restoration in the same way as S. 10 (b) deals with the rent payable in cases in which a portion of the holding is restored to the raiyat. This no doubt is because the first concern of the Legislature in drafting S. 10 of the Act was to provide what rent should be payable for the portion restored. In the absence of some legislative enactment, it is difficult to say what rent, if any, would have been payable for such portion. The provisions of S. 12 (b), namely, that all such rights as the raiyat had in respect of the said land and the incidents thereof before its sale shall revive, would provide no answer to this question. It does, however, answer the question what rent would *prima facie* be payable by a raiyat who is restored to possession of his entire holding.

[21] Although, as I have said, there is no specific section, dealing with the rent of a raiyat who is restored to possession of his entire holding it does not follow that there is no definite law on the point now in question. I have already in dealing with the case of a portion of the holding pointed out that the revival of the incidents of the tenancy under S. 12 (b) does not necessarily involve that the rent shall be payable to all the landlords of the original holding, and obviously this section can have no greater effect in the case of a whole holding than in the case of a portion of a holding being restored.

[22] It would, I think, be a remarkable thing if the Legislature had decided that a raiyat restored to possession of his entire holding should pay his rent to the entire body of landlords of the original holding, while a raiyat restored to a portion of his holding should pay the rent thereof to the co-sharer auction-purchaser landlord, and I should be very loath to read any such interpretation into the Act in the absence of clear words compelling me to adopt such an interpretation. I find no such words in the Act. On the other hand, I think it is very noticeable that, although the Act deals with possession of raiyati holdings which have been purchased by landlords and have thus passed into the possession of landlords, the Act says nothing about the title acquired by the landlord at the auction sale. There is nothing in the Act which suggests that the sales are set aside or the title of the auction purchaser landlord is varied by the Act except in so far as the provisions for restoration of possession to the raiyat impose any limitation on that title. Therefore, as the title of the auction-purchaser landlord is still intact, it follows clearly, to my mind, that the rent is payable to him. I would add that the entire scheme of Act IX of 1938 seems to show that the Legislature dealt with the question of restoring holdings from the possession of auction-purchaser landlords to the original raiyat as a question with which those two parties alone were concerned, and there is nothing that I can see in the Act which suggests that the Legislature intended in any way to affect or modify the rights or liabilities of the co-sharer landlords other than the auction-purchaser.

[23] For these reasons I hold that the plaintiff-appellant in these two appeals is entitled to the 16 annas rent of the holding.

[24] As regards the other point, the Revenue Officer at the time of restoring the defendant to possession of the holding passed an order reducing the rent. This order purported to be under S. 112-A Bihar Tenancy Act, and was passed by the Revenue Officer *suo motu*. It is urged on behalf of the appellant that the order was without jurisdiction.

[25] The leading portion of S. 112-A (1) runs as follows:

> "The Collector may, on the application of an occupancy raiyat or a landlord made in the prescribed form, or, if the Governor by notification directs that a settlement of the rents of the occupancy holdings situated in any area or of any class or classes of occupancy holdings situated in any area shall be made under this section, on an application made as aforesaid or on his own motion."

Then follows the specification of the powers conferred which includes the power to reduce rents in certain circumstances. It was not disputed first that the Revenue Officer was exercising the powers of a collector under the section, but it was urged that he had no power to act *suo motu* This depends on whether there had been a notification by the Governor such as is described in the portion of the section quoted above. This is a pure question of fact It was urged on behalf of the appellant that there was no proof of any such notification. It does not, however, appear that the plaintiff-appellant clearly raised in the lower Courts the question whether there had been any such notification. On the contrary, in the judgment of the lower appellate Court in the case out of which second Appeal No. 1129 of 1945 arises, it is clearly stated that the pleader for the appellant admitted that the Rent Reduction Officer had power to act *suo motu*. It was urged on behalf of the plaintiff-appellant before us that he could not be bound by a wrong admission of law made by his pleader in the lower appellate Court. The admission, however,

was not an admission on a pure question of law, but really amounted to an admission of the fact, namely, the existence of a certain notification which would in law give power to the Revenue Officer to act in this matter *suo motu*. I therefore, hold that in these appeals the plaintiff-appellant cannot challenge the order of the Rent Reduction officer passed under S. 112-A, and I hold that the rent has validly been reduced by that order of the Revenue Officer. I would therefore in these appeals maintain the decision of the lower Courts regarding, the amount of rent payable for the holding but would modify the decrees of the lower appellate Court by allowing the plaintiff-appellant a decree for the 16 annas rent instead of the eight anna share allowed by the lower Courts.

[26] As regards costs, I would direct in all the three cases that the proportinate costs allowed by the trial Courts shall be re-calculated on the amounts found due according to the decision of this Court, but I would direct that the parties bear their own costs in this Court and would confirm the decision of the lower appellate Court in Appeals 1129 and 1130 directing the parties to bear their own costs in the lower appellate Courts in those cases and would set aside the order for costs of the lower appellate Court in second Appeal No. 628.

[27] **Bennett J.** — I agree and I have no doubt that the construction which my learned brother has placed upon the provisions of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (Bihar Act 9 [IX] of 1938) is correct. Not only is that construction one which appears to me to be consonant with the plain wording of the Act, but a consideration of the alternative construction contended for by the appellant shows clearly, in my opinion, that the Legislature must have intended the construction arrived at by my learned brother.

[28] There are five possible situations which may arise as a result of the application of Bihar Act 9 [IX] of 1938 to the position where one co-sharer landlord in execution of his decree for rent has sold and purchased a raiyati holding. Firstly, the auction-purchaser co-sharer landlord may be in possession of the entire holding. This position, of course, would raise no difficulty whether the raiyat who is restored to his holding thereupon becomes the tenant of the auction-purchaser co-sharer landlord or of all the co-sharer landlords. Secondly, the auction-purchaser co-sharer landlord may be in possession of a part of the holding and the raiyat in possession of the remainder of the holding. In such a case, if the raiyat is the tenant of the auction-purchaser, co-sharer landlord, no difficulty arises, but if the raiyat is the tenant of all the co-sharer landlords it becomes impossible literally to apply the provisions of S. 22 (2)(b), Bihar Tenancy Act to that part of the holding left in the possession of the auction-purchaser co-sharer landlord and the resulting position can only properly be resolved if the raiyat is held to be the tenant of the auction-purchaser co-sharer landlord. Thirdly, the auction-purchaser co-sharer landlord may be in possession of one part of the holding, the raiyat may have been restored to possession of a second part of the holding and a tenant to whom the auction-purchaser co-sharer landlord had sublet a third part prior to the material date may be in possession of that third part. Again, if the raiyat is the tenant of the auction-purchaser cosharer landlord, no difficulty arises, but if he is the tenant of all the co-sharer landlords, then the difficulty arises that there is nothing in the Bihar Act 9 [XI] of 1938 which would warrant any change in the relation of landlord and tenant between the auction-purchaser co-sharer landlord and the tenant to whom he had previously sublet such third part and it would be impossible, both literally and in practice, to apply the provisions of S. 22 (2) (b), Bihar Tenancy Act to such a situation. Fourthly, the raiyat may be restored to one part of the holding and the other part may remain in the possession of a tenant to whom the auction-purchaser co-sharer landlord had previously sublet that part. Here, again, if the raiyat is the tenant of the auction-purchaser co-sharer landlord, no difficulty arises, but if he is not, then there is nothing which can properly be held to effect any change in the relation of landlord and tenant between the auction-purchaser co-sharer landlord and the tenant to whom he had previously sublet such part. The position becomes most complicated since part of the holding will be held by a tenant of the auction-purchaser co-sharer landlord who will himself in relation to that part be in possession under S. 22 (2) (b), Bihar Tenancy Act and the other part of the holding will be in possession of a tenant of all the co-sharer landlords. Fifthly, all four of the above-mentioned situations may be complicated by a restoration of the raiyat's restored holding to the auction-purchaser co-sharer landlord. No difficulty, again, would arise in such a case if his restoration is to a holding held by a tenant from him but if his restoration is to the holding of a tenant of all the co-sharer landlords the possibilities of complication and litigation are endless. In my opinion, therefore, when a raiyat is restored to possession of a holding under the provisions of Bihar Act, 9 [XI] of 1938, from which holding he had previously been dispossessed by an auction-purchaser of a co-sharer landlord in execution of his decree for rent, the raiyat upon such restoration becomes the tenant of the auc-

tion purchaser cosharer landlord only and the latter alone is entitled to realise the entire rent of the holding from the raiyat.

N.S D. *Order accordingly.*

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## A. I. R. (35) 1948 Patna 45 *[C. N. 17.]*

MEREDITH J.

*Governor-General in Council—Defendant—Petitioner* v. *Thakursi Dass — Plaintiff—Opposite Party.*

Civil Revn. No 559 of 1946, Decided on 21-4-1947, from order of Sm. C. C. Judge, Darbhanga, D/- 11-4-1946.

**(a) Railways Act (1890), S. 72 — Risk note *Z* proviso—Cases falling under—Procedure to be followed indicated —Burden of proof—Failure on part of plaintiff to follow procedure—Remand —Civil P. C. (1908), O. 41, R. 23.**

In cases to which the proviso to risk note *Z* applies, the Railway Administration must first make the necessary disclosure, and if the consignor is not satisfied with or is doubtful as to the accuracy or truth of the information disclosed and wants evidence, then the Railway Administration must be the first to submit their evidence at the trial. If the consignor is satisfied that full disclosure has been made, then he must discharge the onus upon him and he can do it either by showing that misconduct may be inferred from the evidence led by the Railway Administration, or the disclosures made by them, or he may in his turn affirmatively lead evidence which establishes misconduct. That is one possible course. If, on the other hand, he is not satisfied with the disclosure made, then it is his duty to call upon the Railway Administration for further and better disclosure or evidence. If he does so then it will be for the Court to decide whether his demand has or has not gone beyond the obligation which lies upon the Railway Administration under the proviso contained in the risk note. If the Court holds that his demand for further proof is not justifiable, then of course the Railway Administration need not disclose anything more, and there can be no inference against them from that fact. The plaintiff still has to discharge his burden. But if the Court holds that the demand is reasonable and in spite of the Court's direction the Railway Administration does not disclose the further particulars called for, then the presumption under S. 114 (g) Evidence Act, which says that a presumption may be drawn that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, will come into operation and the plaintiff may call upon the Court to draw an inference of misconduct upon the basis of that presumption alone. But, if the Railway Administration has made the further disclosure and no inference can be drawn from the evidence disclosed, then the burden still lies upon the plaintiff, and he has to discharge it before he can succeed: 24 A. I. R. 1937 P. C. 152, *Foll.* [Para 5]

There is no onus on the Court to see that the parties follow the proper procedure indicated above. It is the business of the plaintiff to ascertain the law: 34 A. I. R. 1947 Pat. 84, *Dissent.* [Para 5]

Where the plaintiff did not call for further disclosure from the Railway Administration in the lower Court and thus failed to conduct his case properly and from the evidence either disclosed by the Railway Administration or led by the plaintiff, an inference of misconduct could not be drawn:

*Held* in the High Court, that the case should not be remanded. The suit should be dismissed: 34 A. I. R. 1947 Pat. 118, *Rel. on.* [Para 5]

('44 Com.) Civil P. C., O. 41, R. 23 N. 10.

**(b) Railways Act (1890), S. 72—Risk notes A and *Z* executed —Goods lost in transit— Liability of railway company —Misconduct—Evidence —Burden of proof in cases coming under risk note A.**

In a suit for recovery of damages for loss of goods consigned under risk notes *A* and *Z* in the course of transit on the defendant's railway:

*Held* (1) that it was open to the Railway Administration to take advantage of either of the risk notes exempting it from liability. It could take advantage of risk note A, which exempted the railway administration from liability even further than the risk note Z; [Para 6]

(2) that the plaintiff having chosen to execute risk note A, which is used for articles which are either in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit, it was not open to him at the trial to claim that the package was perfect and the Court was not entitled to hold upon the basis of statement made by one of the defendant's witnesses that the packing was fully in order: 18 A. I. R. 1931 Cal 489, *Rel. on*; [Para 6]

(3) that so far as risk note *A* was concerned, there was an unconditional burden upon the plaintiff to prove the misconduct or wilful negligence before he could hope to succeed; (Difference between risk notes *A* and *B* pointed out). [Para 7]

(4) that for the purposes of risk note *A*, it was very difficult for the plaintiff in such circumstances to prove misconduct. But a difficulty in proving anything could afford no ground for dispensing with proof: 33 A. I. R. 1946 Pat. 336, *Ref.* [Para 7]

(5) that when risk note *A* had been executed there was no duty cast upon the Railway Administration to disclose anything as was the case under the proviso to risk note *Z*, and therefore, there could be no penalty for non-disclosure. Consequently, S. 114 (g), Evidence Act never came into operation and there was no scope for any adverse inference against the Railway Administration from failure to disclose it. [Para 7]

*Cases referred*:

1. ('37) 64 I. A. 176 : 24 A. I. R. 1937 P. C. 152 : I. L. R. (1937) Bom. 375: 31 S. L. R. 326:168 I. C. 1 (P. C).
2. ('47) 34 A. I. R. 1947 Pat. 84 : 230 I. C. 288.
3. ('47) 34 A. I. R. 1947 Pat. 118 : 225 I. C. 502.
4. ('31) 18 A. I. R. 1931 Cal. 489 : 131 I. C. 31.
5. ('46) 33 A. I. R. 1946 Pat. 336 : 223 I. C. 236.

*P. K. Bose*—for Petitioner.

*Gouri Shanker Prasad for Devendra Prasad*—for Opposite Party.

**Order.** — This is a defendant's application under S. 25, Provincial Small Cause Courts Act.

[2] The plaintiff opposite party consigned certain bales of cloth from Ahmedabad station on the B. B. & C. I. Railway to Darbhanga station on the C. & T. Railway, executing risk notes, A and Z The consignment arrived in a suspicious condition, and, therefore, open delivery was taken, on which it was found that there was a shortage of cloth worth Rs. 66. The plaintiff then after the necessary notices brought a Small Cause Court suit to recover that sum. The learned Small Cause Court Judge has decreed the claim, holding that the loss was due to the misconduct of the railway servants, and

this finding seems to be based merely on an inference which is drawn from another finding that the defendant's case that the packing was defective was not correct. That finding in turn he based on a statement of defendant's witness 2 that the bales in question were ill-pressed packed with iron bands.

[3] It is necessary to consider the nature of the two risk notes and the legal position in cases of this kind. Risk note Z, which is for our purposes the same as risk note B, is a special form to be used when the sender elects to despatch at a special reduced or "owner's risk" rate, and, in view of the reduced rates, charged it exempts the Railway Administration from responsibility for loss and damage except under certain conditions. The consignor in consideration of such lower charge agrees to hold the Railway Administration harmless and free from all responsiblity for any loss, destruction or deterioration of, or damage to, the consignment from any cause whatever upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants. There is, however, a proviso. If the consignment is packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, is protected otherwise than by paper or other packing readily removable by hand, and fully addressed, then where non-delivery or partial non-delivery ensues, which is not due to accidents to trains or to fire, and, secondly, where there is pilferage from a package or packages forming part of the consignment properly packed, and when such pilferage is pointed out to the servants of the Railway Administration on or before delivery, then the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and if necessary, to give evidence thereof, before the consignor is called upon to prove misconduct. But if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

[4] In the present case, as the learned Munsif has pointed out, no evidence was given of any special packing instructions and the package was cartainly protected otherwise than by paper or other packing readily removable by hand, and the pilferage was pointed out to the servants of the Railway Administration on or before delivery, because open delivery was taken. Therefore, the proviso is applicable, and before the plaintiff could be called upon to prove misconduct it was for the Railway Administration to make the disclosures referred to in the proviso.

[5] What exactly this involves and the proper procedure on such cases has been clearly explained by the Privy Council in *Surat Cotton Spinning and Weaving Mills, Limited* v. *Secy. of State* (64 I.A. 176[1]). What it comes to is this. The Railway Administration must first make the necessary disclosure, and if the consignor is not satisfied with or is doubtful as to the accuracy or truth of the information disclosed and wants evidence, then the Railway Administration must be the first to submit their evidence at the trial. If the consignor is satisfied that full disclosure has been made, then he must discharge the onus upon him, and he can do it either by showing that misconduct may be inferred from the evidence led by the Railway Administration, or the disclosures made by them, or he may in his turn affirmatively lead evidence which establishes misconduct. That is one possible course If, on the other hand, he is not satisfied with the disclosure made, then it is his duty to call upon the Railway Administration for further and better disclosure, or evidence. If he does so, then it will be for the Court to decide whether his demand has or has not gone beyond the obligation which lies upon the Railway Administration under the proviso. If the Court holds that his demand for further proof is not justifiable, then of course the Railway Administration need not disclose anything more, and there can be no inference against them from that fact. The plaintiff still has to discharge his burden. But, if the Court holds that the demand is reasonable and in spite of the Court's direction the Railway Administration does not disclose the further particulars called for, then the presumption under S. 114 (g), Evidence Act, which says that a presumption may be drawn that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, will come into operation, and the plaintiff may call upon the Court to draw an inference of misconduct upon the basis of that presumption alone. But, if the Railway Administration has made the further disclosure and no inference can be drawn from the evidence disclosed, then the burden still lies upon the plaintiff, and he has to discharge it before he can succeed. That is the position with regard to risk notes B and Z, and that is the procedure which should be followed by Courts trying such cases. It was not followed in the present case. In similar circumstances in *Governor-General in Council* v. *Visheshwar Lal* (A. I. R. 1947 Pat. 84[2]) Ray J. ordered a remand, presumably because the learned Judge thought that the Court should have explained the legal position of the parties, with respect, I do not think that there was any onus on the Court to see that the parties followed the

proper procedure. It was the business of the plaintiff to ascertain the law, and, if he failed to conduct his case properly, I do not see why he should be given a further opportunity to do so. In the present case, the Munsif has held that the Railway Administration did not sufficiently disclose how the consignment had been dealt with. But there is nothing to suggest that the plaintiff was not satisfied with the disclosure. If he was not satisfied, he ought to have called for further particulars as I have explained, and, in my view, the Munsif was not entitled to draw a presumption against the Railway Administration unless the Administration had been called on to adduce further evidence and had not done so. As I have explained, the facts that the plaintiff did not call for further disclosure, and must be presumed to know the law, would lead to an inference that he was satisfied with the disclosure made, and would try to show misconduct either by an inference from what was disclcsed or otherwise by his own evidence. But, in the present case, no inference has been directly drawn from anything in the defendant's evidence, nor was there anything in evidence from which an inference could have been drawn. Nor was there any direct evidence of misconduct led by the plaintiff. I do not find any sufficient grounds to order a remand, and I may notice that in another of these cases Sinha, J. in *Badridas* v. *Governor-General for India in Council* (A I. R. 1947 Pat. 118[3]) ordered no remand, but upheld the order dismissing the suit, pointing out that where a plaintiff does not call upon the Railway Administration in the lower Court to furnish material facts relating to the details of the carriage of the goods to enable him to make out his case of misconduct, he cannot make it a grievance in the High Court that all the material information had not been given by the Railway Administration.

[6] So much for Risk Note Z. But in the present case the consignor also executed Risk Note A, and thereby even further exempted the Railway Administration from liability. Obviously where two risk notes have been executed limiting the Railway's liability, it is open to the Railway Administration to take advantage of either, and if under either it can be shown that the Railway Administration has escaped liability, then the suit must be dismissed, even if some other form of risk note might also have been executed under which it might be held that liability had not been fully taken away. Risk Note A is a special form of risk note to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The plaintiff chose to execute this Risk Note A, and having done so it was not open to him at the trial to claim that the packing was perfect, and the learned Munsif was not entitled to hold upon the basis of a statement made by one of the defendant's witnesses that the packing was fully in order (see *Mafat Lal Gopal Bhai* v. *B. B. & C. I. Rly. Co., Ltd.* A I.R. 1931 Cal 489[4]) with which I agree. In short, if the consignment was properly packed, then why did the consignor execute this risk note? If he did so, he must be prepared for limitation of the Railway Administration's liability to the extent which that risk note involves.

[7] Now let us consider what that risk note does involve, and how it differs from Risk Note B, a point which has not been considered in some of the cases to which I have been referred. Like Risk Note B, the Railway Administration is held harmless and free from all responsibility for the condition in which the goods may be delivered to the consignor at destination, and for any loss arising from the same, except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants It may be arguable that "condition in which the goods may be delivered" does not relate to pilferage, but leaving that aside the difference between this risk note and Risk Note B is that there is no proviso under which in certain circumstances the Railway Administration has first to make disclosure before the plaintiff can be called upon to prove misconduct. Therefore, there is an unconditional burden upon the plaintiff in such cases to prove the misconduct or wilful negligence before he can hope to succeed. It may be very difficult for the plaintiff in such circumstances to prove misconduct, see *Jankidas Marwari* v. *Governor-General of India in Council* (A. I. R. 1946 Pat. 336[5]) (which case is, of course, only an authority upon its peculiar facts), but I must observe that a difficulty in proving anything can afford no ground for dispensing with proof, and if the consignor does not wish to incur the undoubtedly heavy onus involved, then it is surely open to him not to sign Risk Note A, but instead to inquire in what respect his packing is defective and see that it is put right before despatch. It seems to me, therefore, that a consignor who elects instead to sign Risk Note A has no real grievance. I also think that when Risk Note A has been executed, there is no duty cast upon the Railway Administration to disclose anything, and where there is no duty to disclose there can be no penalty for non-disclosure, and consequently S. 114 (g) never comes into operation, and there is no scope for any adverse inference. It is only where there is some onus on a party to disclose his evidence that an adverse inference

can follow from failure to disclose it. In the present case there was no real attempt on the part of the plaintiff to establish misconduct affirmatively, and the result is that this suit should have failed upon the ground that having regard to the conditions of Risk Note Z no liability had been made out on the part of the Railway Administration.

[8] In the result, therefore, I allow this application, set aside the decision of the Court below, and dismiss the suit with costs throughout, hearing fee two gold *mohurs*.

V.B.B. *Application allowed.*

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**A. I. R. (35) 1948 Patna 48** *[C. N. 18.]*

MEREDITH J.

*Governor-General of India in Council—Defendant — Petitioner* v. *Firm Bishundayal Ram Gourishankar—Opposite Party.*

Civil Revn. No. 560 of 1946, Decided on 24-4-1947, from order of Addl. Sub-Judge, Bhagalpur, D/-9-4-1946.

**(a) Civil P. C. (1908), S. 115—Mere error in law no ground for interference.**

In a case under S. 115, errors in law are not in themselves a ground for interfernce in revision. There must at the lowest be some material irregularity which touches the question of jurisdiction. [Para 3]

('44 Com.) Civil P. C., S. 115, N. 13.

**(b) Railways Act (1890), S. 72—Risk Note A—Onus to prove misconduct—Consignor cannot assert that packing was not defective.**

In Risk Note A the entire onus to prove misconduct lies on the plaintiff, and there is no provision, as there is in Risk Note B, that the Railway Administration must in the first instance disclose how the consignment has been dealt with throughout the journey before the plaintifi is called on to prove misconduct. Again, once Risk Note A has been executed, it is no longer open to the consignor to assert that the packing was not defective. By signing the Risk Note he has admitted the defective packing. [Para 4]

**(c) Railways Act (1890), S. 72—Risk Note A—Claim based on non-delivery—Risk Note A does not apply.**

The word "loss" as used in Risk Note A cannot refer to any loss of the goods, but refers to loss arising from the condition in which the goods are delivered. In other words, the Risk Note A has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and, therefore, no question arises of any loss arising from the condition in which the goods were found on delivery. The Railway Administration can never plead the execution of this risk note in bar to a claim based on non-delivery. [Para 5]

*Case referred:*—

1. ('48) 35 A. I. R. 1948 Pat. 45, Governor-General in Council v. Thakursi Das.

*P. K. Bose*—for Petitioner.

*Raj Kishore Prasad*— for Opposite Party.

**Order.**— This application under S. 115, Civil P. C., is by the Governor-General of India in Council, and arises out of a suit brought against the petitioner for damages in respect of a railway consignment. A consignment of biris was despatched to the plaintiff by the Oudh & Tirhut Railway to Madhepura in seven packages weighing 5 maunds 10 seers. The plaintiff's agent when he went to take delivery found that two packages were broken. He took open delivery, and the weight was found short by 39 seers, and he alleged in the suit that the shortage had been due to the wilful negligence or misconduct of the Railway Administration and its employees. Risk Note A and no other had been executed.

[2] The Munsif dismissed the suit, holding that it had not been proved that the loss of 39 seers was due to the misconduct of the Railway Administration, but the learned Additional Subordinate Judge, Bhagalpur, in appeal has decreed the suit.

[3] I explained the legal position at length with regard to such cases only the other day in Civil Revn. No: 559 of 1946,[1] and it is unnecessary to repeat myself. There can be no doubt that in the present case the learned Subordinate Judge has not applied the law correctly, and did not understand the position as explained by me in that case. But that was an application under S. 25, Small Cause Courts Act, which gives much wider powers of interference in revision that does S. 115, Civil P. C. In a case under S. 115 errors in law are not in themselves a ground for interference in revision. There must at the lowest be some material irregularity which touches the question of jurisdiction, and here there has been none. There has been neither an exercise of jurisdiction not possessed, nor a failure to exercise jurisdiction, nor any irregularity or legal error which has in any way affected the question of jurisdiction. There is, therefore, in my opinion, no scope for interference in revision in this case.

[4] The decision of the learned Subordinate Judge was certainly wrong if the case was covered by the Risk Note, for, in Risk Note A the entire onus to prove misconduct lies on the plaintiff, and there is no provision, as there is in Risk Note B, that the Railway Administration must in the first instance disclose how the consignment has been dealt with throughout the journey before the plaintiff is called on to prove misconduct. Again, once Risk Note A has been executed it is no longer open to the consignor to assert that the packing was not defective. By signing the Risk Note he has admitted the defective packing. Again, the position in the present case was complicated by the fact that the suit was brought by the vendee not the consignor, but the goods had been despatched by the consignor addressed to self, and, I am told, that the railway receipt had not been endorsed over to the plaintiff. It is difficult to see in the circumstances what privity of contract there was between the plaintiff and the

defendant upon which the claim has been based. All these things have been lost sight of by the learned Subordinate Judge, but, as I have said, the errors are errors of law, and as they do not give me the right to interfere in revision it will serve no useful purpose to discuss these questions further.

[5] There is only one thing I would like to add. It seems to me there is some doubt in the present case whether the Railway Administration was really entitled to plead the Risk Note. Risk Note A is a special form to be used when articles are tendered for carriage which are either already in bad condition, or so defectively packed as to be liable to damage, leakage, or wastage in transit. Under the risk note the consignor agrees to hold the Railway Administration harmless and free from all responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants. The word "loss" as used here, in my opinion, cannot refer to any loss of the goods, but refers to loss arising from the condition in which the goods are delivered. In other words, the risk note has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and, therefore, no question arises of any loss arising from the condition in which the goods were found on delivery. I think the Railway Administration can never plead the execution of this Risk Note in bar to a claim based on non-delivery. No doubt, it might cover loss arising from leakage or wastage, but it would be necessary to show that the loss was such as could be said to come within one of the terms "damage", "leakage", or "wastage" used in the heading of the Risk Note. If once the plaintiff can establish that the loss must have resulted from pilferage, then I think Risk Note A ceases to have any application.

[6] In the present case this aspect of the matter does not appear to have been considered, and there are no materials on which any opinion can be expressed as to whether it was a case of pilferage, or wastage, or leakage. I think it, however, better to make the legal position in this regard clear.

[17] With these observations the application must be dismissed, but as I am dismissing it upon technical grounds and not upon the merits there will be no order for costs.

D.S. *Application dismissed.*

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**A. I. R. (35) 1948 Patna 49** *[C. N. 19.]*

BENNETT AND BEEVOR JJ.

*Luthra Uraon — Defendant — Appellant — v. Samua Uraon and others — Plaintiffs — Respondents.*

Appeal No. 428 of 1945, Decided on 9-4-1947, from appellate decree of Sub-Judge, Ranchi, D/- 23-1-1945.

**(a) Civil P. C. (1908), S. 9 — Right to have suit determined in ordinary Courts taken away by Legislature — Presumption as to intention of Legislature.**

When the Legislature takes away the right of an individual to have his suit determined by the ordinary Courts—a right conferred by the Code—it is to be presumed that it does not intend to do so to any greater extent than the effect of the words used and the apparent object of the particular enactment necessarily require. [Paras 7 and 38]

**Annotation:** — ('44-Com.) C. P. C., S. 9, N. 50.

**(b) Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 258—Suit—Object to vary Deputy Commissioner's decision — Object how to be judged — On facts suit held not barred by section.**

What is intended by the first part of S. 258 is to bar suits whose object is to vary the decision of the Deputy Commissioner and the word "indirectly" must be construed in the light of this intention. In order to judge whether the object of the subsequent suit in a civil Court is to vary the decision of the Deputy Commissioner, the substance and scope of the actual decision of the Deputy Commissioner must be carefully ascertained and then compared with the substantial scope and object of the suit: 23 A. I. R. 1936 Pat. 611, *Ref.* [Paras 9 & 10]

Where the Deputy Commissioner on an application under old sub-s. (4) of S. 46 refused to order the ejectment of the transferee of a *zerpeshgi* lease on the ground that the application had been made to him after the period of three years mentioned in that sub-section and subsequently the rayat instituted a suit in the civil Court for a declaration of his title and ejectment of the transferee:

*Held* that the first part of S. 258 did not operate to bar the suit, inasmuch as the substance and scope of the decision of the Deputy Commissioner being quite different from the substance and scope demanded from the civil Court, the decision of the civil Court would not vary, modify or set aside the Deputy Commissioner's decision. [Paras 12 and 13]

**(c) Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 46 (4) before amendment of 1938 — Applicability to invalid transfer.**

The old S. 46 (4) has no application to the case of any invalid transfer. The words in the sub-section "a rayat has, under this section, transferred his right" can only be properly construed as referring to a transfer authorised by the section and not to a transfer prohibited by the section. [Para 19]

**(d) Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 258—Civil suit for declaration of rayat's title and ejectment of transferee — Suit filed after expiry of three years mentioned in old S. 46(4)—Maintainability of suit — Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 46 (4) (before amendment of 1938) and Ss. 139 and 139A.**

Where a suit for declaration of a rayat's title and ejectment of the transferee is filed in a civil Court after the period of three years mentioned in the old S. 46 (4) has elapsed and therefore, the Deputy Commissioner can no longer entertain any application thereunder,

the Deputy Commissioner cannot be said to be competent to try the suit within the meaning of S. 11, Civil P. C., inasmuch as the opening words of S.46 (4), "At any time .....portion thereof" can properly be understood as affecting the jurisdiction of the Deputy Commissioner to hear the application therein authorised and not as merely imposing a limit of time and, therefore, the suit is not barred either by S. 258 or by Ss. 139 and 139A : 13 A. I. R. 1926 Pat. 403, *Expl. and disting.* [Paras 15 and 28]

**(e) Chota Nagpur Tenancy Act (6 [VI] of 1908), Ss. 139 and 139A — Scope — S. 139A designed to fill lacuna in S. 139.**

The first part of S. 139A is designed to fill the lacuna in S. 139 that though a civil Court might be debarred from taking cognizance of an application in respect of which jurisdiction was conferred by the Act on the Deputy Commissioner, it would not be debarred from taking cognizance of a suit concerning the same subject-matter. Therefore, apart from the remedial distinction between "a suit" and "an application", the scopes of Ss. 139 and 139A in relation to the jurisdiction conferred upon the Deputy Commissioner by the old S. 46 (4) are the same and the "matter" excluded by way of suit from the jurisdiction of the civil Courts under S. 139A is the same as what is excluded therefrom by way of application under S. 139. [Paras 24 and 25]

*Cases referred:*—

1. ('36) 15 Pat. 229 : 23 A. I. R. 1936 Pat. 611 : 166 I. C. 86, Gobardhan Sahu v. Lalmohan Kharwar.
2. ('27) 6 Pat. 69 : 13 A. I. R. 1926 Pat. 403 : 97 I. C. 175, Madhab Poddar v. Lall Singh Bhumji.

*Ray Paras Nath* —for Appellant.
*G. N. Mukherji* — for Respondents.

**Bennett J.**— This is an appeal against the decision of the Subordinate Judge of Ranchi reversing a decision of the Additional Munsif at Gumla in a suit in which the plaintiffs, the respondents to this appeal, claimed a declaration of title and ejectment of the defendant from certain lands of which they claimed to be the owners as heirs of their deceased uncle, Nanda Uraon.

[2] It appears that in 1928 Nanda Uraon granted a five year zerpeshgi lease to one Baraik Anant Rai who later assigned the benefit of the zerpeshgi to the defendant and in the 1935 record-of-rights the defendant was recorded as being in possession of the disputed land.

[3] The plaintiffs' case was that their uncle, Nanda Uraon, had left the village some time about the year 1933 and had gone away to Bhutan, leaving the land in question in their custody and that Nanda Uraon had died in Bhutan without leaving any male issue. In para 4 of their plaint they alleged that it was clear from the khatian that the defendant had obtained possession of the land under the five year zerpeshgi lease of 1928. In para 6 they alleged that the defendant had been in possession for more than five years and that for 15 years he had been appropriating the produce of the land and had by this means realised the zerpeshgi money several times over. They further alleged that the defendant was not, in any event, entitled to remain in possession of the land for over five years and that the plaintiffs were, therefore, entitled to recover khas possession. The plaintiffs also stated that they had filed a petition before the Deputy Commissioner under S. 46, Chota Nagpur Tenancy Act, and that the Subdivisional Officer of Gumla, exercising the powers of a Deputy Commissioner rejected that petition on the ground that the period of three years mentioned in the old S. 46 (4) of the Act had elapsed and that they, the plaintiffs, were not entitled to the benefit of the provisions of the new S. 46 (5) of the Act, and referred the parties to the Civil Court.

[4] The defendant denied the plaintiffs' title and contended that the suit was time barred, alternatively that the plaintiffs were not entitled to possession of the land without paying the zerpeshgi money of Rs. 400 and also that, in any event, the Civil Courts had no jurisdiction to entertain the suit.

[4a] The Courts below have arrived at concurrent findings on the question of title and I can find no sufficient reason to differ therefrom. There was no evidence other than that of D. W. 2 before the learned Munsif that Nanda Uraon ever had a son. P. W. 1, one of the plaintiffs, stated that when he left the village Nanda Uraon had only three daughters. The learned Munsiff, for sufficient reason, disbelieved D. W. 2. It was admitted that in the case of Uraon families, females have no right of inheritance. It follows that the plaintiffs were *prima facie* the heirs of Nanda Uraon and that the defendant did not discharge the burden upon him of disproving that *prima facie* inference.

[5] The next point that was raised in the appeal was that, in any event, the suit was barred by limitation in that more than twelve years had elapsed since the execution of the zerpeshgi and it was suggested that that zerpeshgi transaction was nullified by the provisions of the then S. 46 (1), Chota Nagpur Tenancy Act, and that time began to run against the plaintiffs' predecessor-in-title immediately upon the execution thereof and the consequent adverse possession of the transferee. For some reason, which has not been explained, the original deed of the zerpeshgi was not put in evidence by either side and all we have about it is the description contained in the decision of the Subdivisional Officer, Gumla, to the effect that it was a lease for five years. In the absence of any evidence that the zerpeshgi lease contained a clause entitling the zerpeshgidar to remain in possession after the expiration of the five year period of the lease, there is nothing to show that this transfer by way of zerpeshgi lease was,

in fact, invalidated by the provisions of the old S. 46 (1) of the Chota Nagpur Tenancy Act, which were in force in 1928. So far as the evidence goes, therefore, the zerpeshgi lease was a valid lease for a period of five years and the possession of the defendant and his predecessor-in-title did not become adverse to the plaintiffs or their predecessor-in-title until 1933. It follows that the appellant has not discharged the burden of the proof upon him of showing twelve years' adverse possession prior to the date of the institution of the suit on 13-3-1943.

[6] It was next condended by Mr. Ray Paras Nath, whose ability in the elucidation of some of the difficult points hereafter dealt with has been of considerable assistance to the Court, is that the suit was barred under the provisions of S. 258, Chota Nagpur Tenancy Act, by the decision of the Deputy Commissioner on the application to him under the old S. 46 (4).

[7] In considering the alleged bar to the jurisdiction of this Court both under S. 258 above-mentioned and under Ss. 139 and 139A, Chota Nagpur Tenancy Act, hereafter mentioned, we have to bear in mind that the Civil Procedure Code confers jurisdiction upon the civil Courts to hear and determine all civil suits. The right of every individual to have his suit determined by the ordinary Courts is an inherent part of the rule of the law and is, therefore, one of the fundamental liberties of the subject. When, therefore, the Legislature takes away that right, it is to be presumed that it does not intend to do so to any greater extent than the effect of the words used and the apparent object of the particular enactment necessarily require.

[8] In S. 258, Chota Nagpur Tenancy Act, there are, for our purpose, two separate and distinct provisions which affect the jurisdiction of the civil Courts. They are:

(a) the provision that—

"No suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any decision, order or decree of any Deputy Commissioner or Revenue Officer in suit, application or proceeding under . . . . S. 46 sub-s. (4). . . except on the ground of fraud or want of jurisdiction"

and (b) the provision that—

"every such decision, order or decree of any Deputy Commissioner or Revenue Officer shall have the force and effect of a decree of the civil Court in a suit between the parties."

Whilst the effects of these two provisions overlap to a great extent, they are quite distinct from each other and require separate consideration.

[9] In regard to the provision under (a) above, the plain wording thereof indicates clearly that what is intended is to bar suits whose object is "to vary . . . . the decision . . . . of any Deputy Commissioner. . . . .", and the word "indirectly" must be construed in the light of this intention. Where the whole effect aimed at in the suit will be "to vary . . . . the decision . . . . of the Deputy Commissioner . . . .", that will ordinarily be taken as its indirect object even though it be not so expressed in the plaint, and such a suit will be barred but where the main object of the suit is otherwise than "to vary . . . . the decision of the Deputy Commissioner. . . .", the mere fact that the suit, if decreed, will incidentally vary the effect of the decision will not suffice to bar the suit. In this connection I would quote the following extract from the judgment of Fazl Ali. J. (as he then was) in 15 Pat. 229[1]

"there is nothing in S. 258 of the Act to bar a suit for declaration of title and possession and other reliefs, which the Revenue Officer could not grant though it may be to some extent to vary, modify, or even indirectly set aside a decision or decree of a Deputy Commissioner."

[10] In order to judge whether the object of the subsequent suit in a civil Court is "to vary. . . . the decision. . . . of the Deputy Commissioner . . .", the substance and scope of the actual decision of the Deputy Commissioner must be carefully ascertained and then compared with the substantial scope and object of the suit.

[11] Thus, if following a transfer validated by sub-sections (2), (3) or (4) of the present S. 46, Chota Nagpur Tenancy Act, a *rayat*, after the expiration of the period of transfer, applies to the Deputy Commissioner under the present S. 46 (5), Chota Nagpur Tenancy Act, for ejectment of the transferee and the Deputy Commissioner after hearing the parties on the points at issue, namely, the fact that the applicant is or is not the *rayat*, the fact that the transfer is or is not valid and the fact that the application has or has not been made within the period prescribed by the sub-section, orders the ejectment of the transferee then, since the period of limitation prescribed by the present sub-s. (5) of S. 46, Chota Nagpur Tenancy Act, is the same as that prescribed by the general law of limitation, the substance and scope of his decision is the same as would be the substance and scope of a civil Court in a suit in which the *rayat* claims a declaration of his title as such and of the validity and subsequent expiration of the transfer and also the ejectment of the transferee, and it follows that such a suit will thereafter be barred by the decision of the Deputy Commissioner.

[12] But, if the Deputy Commissioner on an application under the old sub-s. (4) of S. 46, Chota Nagpur Tenancy Act, refused to order the ejectment of the transferee on the ground that the application has been made to him after the period of three years mentioned in the old sub-s. (4) of S. 46 his decision will not under, S. 258, Chota Nagpur Tenancy Act., bar a subse-

quent suit in the civil Court for a declaration of the *rayat's* title and ejectment of the transferee, because the substance and scope of his decision will be quite different to that demanded from the civil Court and the decision of the civil Court will not, therefore, vary, modify or set aside the Deputy Commissioner's decision, though of course, in such a case it will be a matter for consideration whether in the particular circumstances the suit is or is not barred by some other provision of the Chota Nagpur Tenancy Act.

[13] In my opinion, therefore, the first provision of S. 258, Chota Nagpur Tenancy Act, does not operate to bar the present suit.

[14] In regard to the second provision of S. 258, Chota Nagpur Tenancy Act, set out under (b) above, the effect of this provision, for the purposes of the matter in issue in this appeal, is to bring into play the ordinary principles of *res judicata* as if the decision of the Deputy Commissioner were that of a civil Court. This provision, in so far as it bars a suit in a Civil Court founded upon substantially the same cause of action as that relied upon in the proceedings before the Deputy Commissioner, largely overlaps the first provision in S. 258, Chota Nagpur Tenancy Act, but it goes further and has the effect of barring the trial in the civil Court of any issue which was or which might and ought to have been raised in the proceedings before the Deputy Commissioner: provided, of course, that such issue in the civil Court arises in a suit which the Deputy Commissioner was competent to try.

[15] The question whether this second provision of S. 258, Chota Nagpur Tenancy Act, operates to bar the present suit depends, therefore, upon whether the Deputy Commissioner had the jurisdiction to entertain the present suit. His jurisdiction, if any, must arise from the old S. 46, because the present S. 46 (5) of the Act applies only to transfers made after the amendment of 1938 came into force and though the old S. 46 (4) was repealed by the Amending Act of 1938, it remains in force for the purpose of enforcing any right or remedy granted thereunder by virtue of the provisions of S. 8, Bihar and Orissa General Clauses Act, 1917. But, whatever may be the true construction of the old S. 46 (4), it is perfectly clear that in 1942 the period of three years mentioned in that sub-section had elapsed and that the Deputy Commissioner could no longer entertain any application thereunder. In those circumstances, it is impossible, in my opinion, to say that in 1942 the Deputy Commissioner was competent to try the present suit within the meaning of S. 11, Civil P. C., unless the opening words of the old S. 46 (4) can properly be understood, not as affecting the jurisdiction of the Deputy Commissioner to hear the application therein authorised, but as imposing merely a limit of time and demonstrating an intention on the part of the Legislature to limit the enforcement of the prohibition of transfers contained in the old S. 46 (1), Chota Nagpur Tenancy Act, to cases where the transferor applied for relief under sub-s. (4) thereof. This latter question also arises in relation to the bar created by Ss. 139 and 139A, Chota Nagpur Tenancy Act.

[16] I turn, therefore, to the alleged bar to the present suit under Ss. 139 and 139A, Chota Nagpur Tenancy Act which constitutes the real substantive point in the appeal. The appellant relied upon the decision of a Division Bench of this Court in 6 Pat. 69[2] which appears to be the only direct authority on the point raised before us and where it was held that:

> "No suit for the ejectment of an under-tenant by his immediate landlord lies in the civil Court under S. 139A read with S. 46 (4), Chota Nagpur Tenancy Act, 1908."

I have read and re-read the record of this case and it is to my mind perfectly clear that the learned Judges who decided that case never had in mind and never purported to decide the question that arises here, namely, whether the jurisdiction of this Court is ousted by Ss. 139 and 139A, Chota Nagpur Tenancy Act, although at the date of the institution of the suit, it was not open to the plaintiff to have recourse to the Deputy Commissioner under the old S. 46 (4), Chota Nagpur Tenancy Act. Adami J. in the course of his judgment stated:

> "Before us the only point taken is that the suit was in fact not maintainable by the civil Court; it should have been instituted in the Court of the Deputy Commissioner. It is true that there is no specific section in the Chota Nagpur Tanancy Act providing for the ejectment of an under-tenant, though there are provisions for the ejectment of occupancy raiyats and non-occupancy raiyat. There is, however, a provision, namely, S. 46, sub-s. (4), which allows a tenant to approach the Deputy Commissioner with an application to eject an under-tenant at any time within three years after the expiration of the period for which the raiyat has transferred his right in the holding or any portion thereof. The section allows the Deputy Commissioner in his discretion, on the application of a raiyat, to put the raiyat into possession of such holding or a portion thereof in the prescribed manner. It was open, therefore, to the plaintiff in this case to have applied to the Deputy Commissioner to take action under S. 46, sub-s. (4)."

I do not think that his Lordship could possibly have used this language if he had in mind any possibility that at the date of the institution of that suit it was not open to the plaintiff in that suit to obtain relief from the Deputy Commissioner. There is no mention throughout the report of any question as to the lapse of the three year period. Moreover, the permanent leases there in question were granted in 1894 and 1897 respectively and, so far as I have been able to

ascertain, were (not ?) invalidated by any legislation prior to the Chota Nagpur Tenancy Act (Amendment) Act, 1903. They were certainly not invalidated by S. 5 of that Act nor by S. 46 (1), Chota Nagpur Tenancy Act, 1908, neither of which had any retrospective effect, and, on the face of the report it is difficult to understand what recourse it was that the plaintiffs in that suit in fact had to the Deputy Commissioner.

[17] In my opinion, therefore, the decision in 6 Pat 69[2] is not binding upon us for the purposes of the point raised in this appeal.

[18] It appears from the decision of the Deputy Commissioner that the *zerpeshgi* in question was a lease for five years. If that was a valid lease, then in 1933 at the expiration of the lease, the plaintiffs' predecessor-in-title could at any time during the following three years have applied to the Deputy Commissioner for an order of ejectment under the old S. 46 (4).

[19] We do not have to consider the possible alternative in which the *zerpeshgi* lease was invalid by reason of some clause therein entitling the tenant to retain possession after the expiration of the five years, because, firstly in that hypothesis this suit is, in any event, time-barred and secondly because I cannot read the old S. 46 (4), Chota Nagpur Tenancy Act, as having any possible application to the case of any invalid transfer. That sub-section falls to be read with the operative part of sub-s. (1) of old S. 46 as follows:

"46. (1) No transfer by a rayat of his right in his holding or any portion thereof—

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) by sale, gift, or any other contract or agreement, shall be valid to any extent:. . . .

(4) At any time within three years after the expiration of the period for which a rayat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the rayat, put the rayat into possession of such holding or portion in the prescribed manner."

The words in the sub-section "a rayat has, under this section, transferred his right" can only properly be construed as referring to a transfer authorised by the section and not to a transfer prohibited by the section. To hold otherwise would be to deprive the *rayat* of his otherwise immediate right of recourse to the civil Court and postpone his remedy to the expiration of the transaction which the section forbids and this would, in any event, be absurd, since it would defeat the whole object of the legislature as demonstrated by sub-section (1). It follows, therefore, that unless a *rayat* chose to add a claim in the alternative for a fair rent and so bring himself within sub-s. (4A) of S. 139, Chota Nagpur Tenancy Act, his only means of obtaining the ejectment of a person whom he had let into possession of his holding under a transfer rendered invalid by S. 46 (4), Chota Nagpur Tenancy Act, was by suit in the civil Court. This position is not without significance in relation to the true construction of the old S. 46 and Ss. 139 and 139A, Chota Nagpur Tenancy Act.

[20] The provision in S. 139(4) as to "suits and applications under this Act to eject any tenant of agricultural land" would not appear to have any application to the ejectment of a person let into possession under a valid lease, as, at the expiration thereof, he is no longer a tenant

[21] The provision in S. 139(4) which envisages suits or applications "under the Act" to cancel any lease of agricultural land appears to refer solely to the provisions of S. 178 of the Act and to have no relevance for our purpose.

[22] The relevant provisions of S. 139, Chota Nagpur Tenancy Act, therefore, for the purposes of this appeal are as follows:

"*139.* The following suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act, namely:

* * * * *

(8) all suits and applications in respect of which jurisdiction is conferred by this Act on the Deputy Commissioner."

[23] For our purposes therefore the operative parts of S. 139 may be correctly paraphrased as follows: No 'suit' or 'application' in respect of which jurisdiction is conferred by this Act on the Deputy Commissioner shall be cognizable in any other Court. It is convenient immediately to compare this provision with the provisions of S. 139A which runs as follows:

"Subject to the provisions of Chapter 12, no Court shall entertain any suit, concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under S. 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this Act relating to appeal, be final."

[24] It appears at once that the first part of S. 139A is designed to fill the lacuna in S. 139 that though a civil Court might be debarred from taking cognizance of an application in respect of which jurisdiction was conferred by the Act on the Deputy Commissioner, it would not be debarred from taking cognizance of a suit concerning the same subject-matter. Thus if S. 139A did not exist, a person though debarred from proceeding by way of a mere 'application' therefor in a civil Court, might nevertheless have been allowed to bring a 'suit' in a civil Court for the ejectment of a transferee on the same grounds and in the same circumstances as an 'application' for that purpose might have been brought before the Deputy Commissioner.

[25] It is clear, therefore, that, apart from the remedial distinction between "a suit" and "an application" the scopes of Ss. 139 and 139A in relation to the jurisdiction conferred upon the Deputy Commissioner by the old S. 46 (4), Chota Nagpur Tenancy Act, are the same and "the matter" excluded by way of suit from the jurisdiction of the civil Courts under S. 139A is the same as what is excluded therefrom by way of application under S. 139.

[26] In relation to the old S. 46 (4), Chota Nagpur Tenancy Act, what is excluded from the jurisdiction of the civil Courts is the application in respect of which jurisdiction is thereby conferred upon the Deputy Commissioner, that is to say, the jurisdiction" at any time within three years after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof" to put the raiyat in possession. It is not very easy on the face of this section to determine whether the period of three years therein mentioned relates to the act of the Deputy Commissioner of putting the raiyat in possession or to the application therefor by the raiyat, but happily this question, in the view which I have taken, is immaterial.

[27] What we have to determine is whether the Legislature in the old S. 46 (4), Chota Nagpur Tenancy Act, has placed the whole subject of the ejectment, at the instance of a raiyat, of a transferee, after the expiration of a valid transfer, within the jurisdiction of the Deputy Commissioner and, having done so, has thereafter imposed a limitation upon the raiyat's right of action or whether it is only the ejectment of such a transferee within the period of three years from the expiration of a valid transfer that has been so placed within the Deputy Commissioner's jurisdiction. In other words, does the opening phrase in the old S. 46 (4), Chota Nagpur Tenancy Act, "at any time within three years after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof" go to the jurisdiction of the Deputy Commissioner or not.

[28] In my opinion, this opening phrase in the old S. 46 (4), Chota Nagpur Tenancy Act, must be construed as going to the jurisdiction of the Deputy Commissioner for the following reasons:

(1) The sub-section starts off with the provision as to time and the words used therefor are quite inapt to describe a prior conferring of jurisdiction followed by a limitation of the right of action conferred by the old S. 46 (1).

(2) In the absence of the old S. 46 (4), Chota Nagpur Tenancy Act, the old S. 46 (1) would have entitled the *raiyat* to go to the civil Court and obtain the ejectment of the transferee at any time within twelve years after the expiration of the transaction, if it was a valid transaction. Having regard to the considerations above set out which, in my opinion, are always applicable to the construction of any provision by which the Legislature purports to restrict the jurisdiction of the civil Courts, there is, I think, provided that the words used are capable of construction in that sense, a presumption that the Legislature in allowing the raiyat the more summary and simple remedy by way of application to the Deputy Commissioner during the period of three years in question, did not intend to debar him of his right of recourse to the civil Courts during the remaining nine years which would otherwise have been open to him.

(3) As I have already stated, the old S. 46 (4) did not apply to invalid transfers and, therefore, nothing in the Chota Nagpur Tenancy Act operated to debar the *raiyat* from putting the right of action conferred upon him by the old S. 46 (1), following such an invalid transfer into suit in the civil Courts. It would be really extra-ordinary if the Legislature in those circumstances had decided to deprive a raiyat of his similar right of recourse in relation to a valid transfer. The whole of Chap. 8, Chota Nagpur Tenancy Act, if not indeed the whole Act, is intended to benefit *raiyats* and not to prejudice them. The Legislature understandably benefited a *raiyat* who had entered into a valid transfer of his holding by giving him a special, simple and summary remedy to obtain re-possession of his holding at the expiration of the transfer. It would be quite inconsistent with the Legislature's intention to benefit the *raiyat* to suppose that it thereafter intended to deprive him of the rights already conferred upon him by the old S. 46 (1).

[29] For these reasons I am of opinion that the appeal should be dismissed with costs.

[30] I ought to mention in conclusion that this appeal came, in the first instance, before Shearer J. who referred it to a larger Bench on the ground that it raised the question of law as to whether the possession of the defendants, which was admittedly originally taken with the permission of Nanda Uraon, became immediately adverse to him or only became so adverse on a demand for possession from Nanda Uraon. Having regard, however, to the fact, as already mentioned, that the defendants failed, in any event, to prove that they were in adverse possession for more than twelve years prior to the institution of the suit, we were of opinion that this actual point of law did not arise although, in the result,

other points of law of equal difficulty have in fact arisen.

[31] **Beevor J.**—I was at first doubtful whether the suit, out of which this appeal arises, was maintainable in the civil Court, but I am now satisfied that the conclusion reached by my learned brother is correct. I should, however, like to set out shortly my own reasons for accepting this conclusion.

[32] The section to which my learned brother has referred as the old S. 46 (4), Chota Nagpur Tenancy Act, is the section in the form in which it stood from 1924 to 1938 and that was the section in force in 1928 at the date of the transfer now in question and continued in force until beyond three years from the expiry of the five year period of the *zerpeshgi* created by the transfer. Although that section was repealed in 1938 and a new S. 46 substituted for it, the effect of S. 8 of the Bihar and Orissa General Clauses Act, 1917, was to maintain the rights and liabilities which had accrued under that section and also the remedies for enforcing such rights. It follows, therefore, that the validity of the transfer in question is governed by that old S. 46, Chota Nagpur Tenancy Act, and any rights in respect of the transfer which were created by that section would be unaffected by its repeal in 1938.

[33] As my learned brother has pointed out, there is nothing in the pleadings or the evidence in this case to show that the transfer in question was for a period which exceeded or might in any possible event exceed five years. It must, therefore, be taken that the transfer was a valid transfer for the period of five years Section 46 (4), therefore, gave the *raiyat*, the transferor, a right to apply to the Deputy Commissioner within three years from the expiry of that five year period to recover possession. At present I see no reason to doubt the view of my learned brother that the old S. 46 (4) did not apply in the case of an invalid transfer, but for the purposes of this appeal it is unnecessary to make any decision on the point. I agree with the finding of my learned brother that the plaintiffs are the heirs of Nanda Uraon and S. 6 (1), Chota Nagpur Tenancy Act, defining the word "*raiyat*" specifically provides that it shall include the successors-in-interest of the person who originally acquires such a right. Therefore, after the death of Nanda Uraon, the plaintiffs had the right to make that application under S. 46 (4), Chota Nagpur Tenancy Act, provided it was made within the time allowed.

[34] Actually no application was made within the period of three years from 1933 in which year the five year period of the transfer expired, and although the plaintiffs did present at a later date a petition purporting to be under S. 46 (4) it was rightly rejected by the Revenue Officer as being barred by limitation. Section 46 (5) of the Act, as it now stands after the amendment of 1938, allows a period of 12 years for an application to the Deputy Commissioner, but that section will apply only to transfers made subsequent to the amendment.

[35] Section 139 of the Act, so far as it is material to the present appeal, runs as follows:

"The following suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act, namaly;

* * * *

(4) all suits and applications under this Act, to eject any tenant of agricultural land or to cancel any lease of agricultural land;

* * * *

(8) all suits and applications in respect of which jurisdiction is conferred by this Act, on the Deputy Commissioner; and

Provided that the Deputy Commissioner may, subject to such rules as may be made in this behalf under S. 264, transfer any particular suit or application or any class of suits or applications cognizable by him under this section to a competent Civil Court for trial."

[36] No form of suit is provided under the Act to eject an under-raiyat, and even if the zerpeshgi in question was "a lease" for five years, it is not shown that the defendants were tenants after 1933. Therefore, cl. (4) of this section has no application to the facts of the present case. Clause (8) however, will apply so far as an application under S. 46 (4) by the raiyat to recover possession from the defendants is concerned. This section, however, would not bar the institution in Civil Court of a suit in respect of the matter in respect of which the Act merely provides for an application before the Deputy Commissioner. It seems that it was for this very reason that S. 139A was introduced into the Act by the amendment of 1920. That section runs as follows:

"Subject to the provisions of Chapter 12, no Court shall entertain any suit, concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under S. 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this Act relating to appeal, be final."

[37] Now for three years after some date in 1933 an application under S. 46 (4) by the *raiyat* to recover possession of the property transferred by the *zerpeshgi* of 1928 was cognizable by the Deputy Commissioner, but the old S. 46 (4) shows clearly that after that period no such application was cognizable by him. There is no doubt that if the present suit is maintainable in the Civil Court, the period of limitation for such a suit will be 12 years from 1933. The question for decision really seems to be whether the wrods "is cognizable" in S. 139A meant "is cognizable at any time" or "is cognizable at the date when the suit is filed."

[38] I was at first inclined to the view that in the absence of any restrictive words in the section itself the former interpretation should be accepted, but I am now satisfied that this is wrong. My reasons for this conclusion are twofold. My first reason is that the Legislature is not to be presumed to have excluded the jurisdiction of the Civil Courts in any matter unless there is a clear statutory provision excluding such jurisdiction, and any statutory provision which excludes the jurisdiction of the Civil Court is to be construed strictly and should not be understood as excluding such jurisdiction in any case which is not clearly covered by the wording of that statutory provision.

[39] My second reason is that if S. 139A is restricted to cases in which an application is cognizable by the Deputy Commissioner at the date of suit, this interpretation not only seems to fit in with an intelligible scheme for distribution of functions between the Deputy Commissioner and the Civil Courts but also seems to fit in with the wording of S. 258 of the Act. In order to explain this reason I must deal with the matter in somewhat greater detail. It seems quite reasonable to think that the Legislature might allow the *raiyat* to proceed by the summary remedy by way of an application to the Deputy Commissioner provided he makes his application within three years; whereas, if he delays the matter, he will have to adopt the more expensive and usually slower remedy provided by a suit.

[40] My learned brother has set out the two separate provisions embodied in S. 258 of Chota Nagpur Tenancy Act and has pointed out that they are quite distinct from each other. I agree with him for the reasons which he has given in holding that the first provision of S. 258 does not bar the present suit and it is only necessary for me in the present connection to consider the second of those provisions. This is the provision which applies to S. 46, sub-s. (4) among other sections of the Act; "every such decision, order or decree of any Deputy Commissioner or Revenue Officer shall have the force and effect of a decree of the Civil Court in a suit between the parties. If the view is accepted that S. 139A applies only so long as an application to the Deputy Commissioner is still cognizable by him, then the effect of this provision embodied in S. 258 is quite easy to understand, namely, that if the *raiyat* avails himself of the summary remedy provided by S. 46 (4), then the result of this application will be exactly the same as if there had been no provision for such a summary remedy and he had proceeded by way of a suit in the Civil Court. If, however, S. 139A is construed as meaning that no Civil Court shall entertain a suit concerning any matter in respect of which an application was at some date cognizable by the Deputy Commissioner, then I should find it difficult to attribute any definite meaning to this provision of S. 258.

[41] As regards the decision in 6 Pat. 69,[2] I agree with my learned brother in finding considerable difficulty in discovering on what basis it could be held that any application under S. 46 (4) was at any time open to the plaintiff of the suit then in question. It seems to me clear, however, that that case did not decide any proposition of law regarding the circumstances in which an application would lie under S 46 (4) to th Deputy Commissioner. The decision proceeded on the basis that as a matter of fact such an application did lie in that case, and then it proceeded to lay down and apply the legal principle that where such an application lay to the Deputy Commissioner, the suit in the Civil Court was barred by S 139A. That proposition is in no way inconsistent with the decision at which we have arrived.

[42] For these reasons I agree that this appeal should be dismissed with costs.

V.R. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 56** *[C. N. 20.]*

MEREDITH J.

*Saukhi Gope and others — Petitioners* v. *Uchit Rai — Opposite Party.*

Criminal Revn. No. 135 of 1947, Decided on 8-4-1947, from order of Addl. Sessions Judge, 2nd Court, Patna, D/- 20-12-1946.

**(a) Penal Code (1860), S. 499, Exception (9) — Qualified privilege — Advocate and parties to judicial proceedings — Applicability of English law.**

The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty or of parties in respect of words spoken during judicial proceedings depends on the provisions of S. 499 Penal Code and the Court will presume good faith, unless there is cogent proof to the contrary for which further investigation to see whether there is bad faith would be necessary. The privilege is not absolute but qualified The common law of England under which an advocate can claim an absolute privilege for words uttered in the course of his professional duty is not applicable to India: 36 Mad. 216, *Approved but not followed*; 13 A. I. R. 1926 Pat. 499. *Followed on principle of stare decisis*: 11 Beng L. R. 321 (P. C.), 13 A. I. R. 1926 Mad. 906 (F.B.) and 8 A. I. R. 1921 Cal. 1 (S.B.), *Ref.* [Para 3]

**(b) Penal Code (1860), S. 499 — Complaint under, for alleged defamatory questions asked during judicial proceedings held premature.**

Where a person was complained against under S. 499 for questions asked by him in cross-examination through his counsel, during criminal proceedings which were still pending and the Court had not expressed any opinion regarding witnesses in question and the Court had not considered the questions put in cross-examination improper or irrelevant and the actual questions put by the counsel were not available except the answers to them by the witnesses:

***Held*** that the complaint was premature. [Para 5]

**(c) Penal Code (1860), S. 499 — Judicial proceedings — Counsel putting alleged defamatory questions in cross-examination — Party, if can be charged for defamation.**

Where a party to a judicial proceeding is charged under S. 499 for the alleged defamatory questions put by his counsel in cross-examination, it is not possible to assume that the questions were put upon definite instructions. It would have to be proved, and having regard to S. 126, Evidence Act it could not possibly be proved unless with the client's express consent which in the circumstances he would hardly be likely to accord. Consequently no one could ever be prosecuted for defamation in regard to any instructions which he might have given to his lawyer. It is the lawyer's business to decide whether he could properly act upon the instructions, and whatever responsibility might ensue from acting upon those instructions would be his and no one else's. [Para 7]

*Cases referred:*—

1. ('13) 36 Mad. 216 : 14 I. C. 659.
2. ('73) 11 Beng. L. R. 321 : 3 Sar. 179 : 2 Suther 547 (P. C.).
3. ('26) 49 Mad. 728 : 13 A. I. R. 1926 Mad. 906 : 96 I. C 978 (F.B ).
4. ('21) 48 Cal. 388 : 8 A. I.. R. 1921 Cal. 1 : 59 I. C. 143 (S. B)
5. ('27) 6 Pat. 224 : 13 A. I. R. 1926 Pat. 499 : 97 I. C. 354.
6. ('35) 1935 M. W. N. 460.

*Rajkishore Prasad* — for Petitioners.
*Ramakant Varma* — for Opposite Party.

**Order.** — The four petitioners were accused in a criminal case. The opposite party was a prosecution witness. During cross-examination by the petitioners' lawyer the opposite party made these statements; "It is not a fact that Lachhuman and all the prosecution witnesses of this case are members of a gang of thieves stealing Mokaman Ghat railway goods" and "It is not a fact that this case has been concocted against the accused as these accused were instrumental in reporting to the Superintendent of Police about the formation of a gang of thieves by us."

[2] After this, but while the criminal case was still pending, the opposite party filed a petition of complaint in the Court of the Subdivisional Officer, Barh, for prosecuting the petitioners for defamation under S. 500, Penal Code. The Magistrate dismissed the complaint, holding that it could not be argued that these statements had been made simply to defame, and they were privileged under exception 9 of S. 499, Penal Code. A petition was then made in the Court of Sessions, and the Additional Sessions Judge, Patna, allowed the application and directed further inquiry into the case. The present application is directed against this order for further inquiry.

[3] The question whether statements made by parties to judicial proceedings or their advocates are absolutely privileged as in English law, or enjoy only a qualified privilege if made in good faith under S. 499, Penal Code, is one about which there has been considerable difference of opinion. A Full Bench of the Madras High Court in In re, P. Venkata Reddy 36 Mad. 216[1] held that the exceptions in S 499 were not exhaustive, and did not exclude the application of the English common law rule for absolute privilege to judicial proceedings in this country. That is the opinion I should like to have adopted myself, because, in my opinion, where statements are made by parties or witnesses, or their lawyers they ought to have absolute freedom subject to the protection which the Court is authorised to afford under S. 148, Evidence Act, or such as is afforded in the case of witnesses on oath by a prosecution for false evidence, as was pointed out by the Privy Council in Baboo Ganesh Dutt Singh v. Mugneeram Chowdhry 11 Beng. L. R. 321.[2] If the Court does its duty no further protection should be necessary by way of a prosecution for defamation, or civil suits for damages. But I find myself concluded by authority. In Tiruvengada Mudali v. Tripura Sundari Ammal 49 Mad. 728[3] the previous Full Bench decision in In re P. Venkate Reddy 36 Mad. 216[1] was dissented from, and in Satish Chandra Chakravarti v. Ram Doyal De 48 Cal. 388[4] the whole position was examined, and a distinction was made between prosecution for defamation under S. 500 and suits for damages, and it was held that while in the latter case the English rule may be applied in accordance with the principles of equity and good conscience, in criminal prosecutions it is not possible to go outside the exceptions specified in S 499 of the Code. The ninth exception is qualified only, and depends upon good faith. This decision in 48 Cal. 388[4] has been followed by a Division Bench of this Court in Nirsu Narayan Singh v. Emperor 6 Pat 224,[5] where it was laid down that the liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of S. 499, Penal Code, and the Court will presume good faith, unless there is cogent proof to the contrary The privilege is not absolute, but qualified The common law of England under which an advocate can claim an absolute privilege for words uttered in the course of his professional duty is not applicable to India.

[4] As this decision is binding upon me I must hold that there is only qualified privilege, and the question of good faith is involved, and though good faith will be presumed, further investigation would be necessary to see if there was evidence of bad faith, but for other circumstances to which I shall now refer and in view of which the decision of the learned Additional Sessions Judge can be by no means supported.

[5] In the first place, the complaint was premature, because the criminal case is still pend-

ing and we do not yet know what view the Court will express with regard to the witnesses or witness in question. Presumably the Court did not think the questions put in cross-examination improper or irrelevant, or it would not have allowed them. In the second place, the actual statements of the advocate are not before us. There is nothing to show what he said. We only have the answers and we cannot be sure that the questions might not have been put in such form that they could not in any event be regarded as defamatory.

[6] In the third place, there seems to be nothing whatever to show that whatever questions were put were put upon definite instructions from the petitioners. The learned Additional Sessions Judge wants to presume that, but I am afraid that cannot be done. The defence lawyer might conceivably have based his cross-examination upon some other materials in the case, or some statements of other witnesses, and not on specific instructions from his clients.

[7] Lastly, the petitioners would not, in any event, be liable, and if any one were liable for defamation it would be the lawyer. I have been referred to the notes in Ratanlal's Penal Code for a Madras case, [Palaniappa Chettiar v. Emperor] 1935 M. W. N. 460,[6] which, according to the learned commentator, laid down that where the accused was charged with defamation because his vakil put a defamatory question to the complainant and the vakil gave evidence that he did so on the instruction of his client, the accused, the instructions of the accused to his vakil were inadmissible under S. 126, Evidence Act and the accused was not guilty of defamation committed as it were by proxy through the mouth of his vakil. Unfortunately, the decision is not obtainable in the library here, but the reasoning quoted seems to me sound. If the petitioners did anything it was only to make certain communications to their lawyer. Under S. 126 no lawyer shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course, and for the purpose, of his employment as such. I have said that it is not possible to assume that the questions were put upon definite instructions. It would have to be proved, and having regard to S. 126 it could not possibly be proved, unless with the client's express consent which in the circumstances he would hardly be likely to accord. It follows from this that no one could ever be prosecuted for defamation in regard to any instructions which he might have given to his lawyer. It is the lawyer's business to decide whether he could properly act upon the instructions, and whatever responsibility might ensue from acting upon those instructions would be his and no one else's. The present attempt to prosecute the petitioners was in the circumstances completely misconceived. The application succeeds, the rule is made absolute and the complaint against the petitioners will stand dismissed.

R.G.D. *Rule made absolute.*

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**A. I. R. (35) 1948 Patna 58** *[C. N. 21.]*

MEREDITH AND BENNETT JJ.

*Gurunarayan Das and others*—*Petitioners* v. *Emperor.*

Criminal Revn. No. 527 of 1945, Decided on 25-2-1946, from order of Sessions Judge, Gaya, D/- 6-2-1945.

**(a) Criminal P. C. (1898), S. 345 (5A)—Power under, when should be used.**

The jurisdiction to allow a compromise in suitable cases in revision, even after the conviction, and dismissal of the appeal, is undoubtedly there. At the same time the occasions when the Court may properly allow a compromise and set aside convictions at the stage of revision must be rare indeed. The exceptional power which has been conferred upon the High Court by sub-s. (5A) of S. 345 should not be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before the Court passed final orders in the case : 21 A. I. R. 1934 Sind 122 and 26 A. I. R. 1939 Cal. 728, *Rel. on.* [Para 5]

[In this case there was no attempt at compromise until after the accused had not only been convicted, but their appeal had been dismissed. However in view of the peculiar circumstances of the case i. e., the parties had settled their differences and four years had passed after the offences, and the compromise if allowed was likely to avoid further litigation, the application to compound the offences under Ss. 325, 324 and 323, Penal Code was allowed.] [Para 8]

**Annotation:** — ('46-Com.) Cr. P. C., S. 345, N. 16, Pt. 8.

**(b) Criminal P. C. (1898), S. 345—Ss. 147 and 148, Penal Code—Offences under, not compoundable.**

The offences under Ss 147 and 148, Penal Code are not compoundable at all, and therefore, no acquittal can be allowed by reason of the compromise in regard to the convictions under these sections. [Para 7]

**Annotation:**—('46-Com.) Cr. P. C., S. 345, N. 8, Pt. 4.

*Cases referred* :—

1. ('35) 36 Cr. L. J. 210 : 21 A. I. R. 1934 Sind 122 : 28 S. L. R. 109 : 152 I. C. 412.
2. ('39) 26 A.I.R. 1939 Cal. 728 : I. L. R. (1939) 1 Cal. 567 : 185 I. C. 177.

*S. N. Sahay and Rajkishore Prasad* — for Petitioners.

*Brij Kishore Narain Singh* — for the Crown.

**Meredith J.** — The convictions of and sentences upon the petitioners, as reduced by the appellate Court, are as follows :

[2] Gurunarayan Das — Nine months and a fine of Rs. 100 under S. 325, Penal Code, and six months, to run concurrently, under S. 147. Bhagwat Mahto and Jagarnath Singh — three months under S. 323, and three months, con-

currently, under S. 147. Ramjatan Mahto—six months under S. 324, and six months, concurrently, under S. 148.

[3] The relevant facts are as follows : Gurutahal Das a step-brother of Gurunarayan Das, had brought a suit for partition. As a result of that, according to the findings of the Courts of fact, on 28th March 1942, the petitioners made an attempt to eject Gurutahal Das and his brother, Sheotahal Das, from the family house by force. A fight ensued in which Gurutahal, in addition to other slight injuries, had both bones of his right fore-arm fractured. Jai Narain, however, a brother of Gurunarayan, was killed by someone on Sheotahal's side by a spear blow. A murder case ensued in which one Karu Sahu was convicted and condemned to death; but the conviction and sentence were set aside by the High Court, so that the case eventually ended in acquittal. The trial of the case against the petitioners was held up pending the disposal of the murder case. Hence the long delay.

[4] The only point which has been urged in revision is that the parties have arrived at a compromise, and a petition of compromise has been filed on behalf of both sides. It is urged that the offences under Ss. 325, 324 and 323 are compoundable with the permission of the Court, and under sub-s. (5A) of S. 345, Criminal P. C., a High Court acting in the exercise of its powers of revision under S. 439 may allow any person to compound any offence which he is competent to compound under the section.

[5] The jurisdiction to allow a compromise in suitable cases in revision, even after the conviction, and dismissal of the appeal, is undoubtedly there, and there are rulings to that effect, of which I may refer to *Jumo Sherkhan* v. *Emperor* (36 Cr.L.J. 210[1]) and *Baburali Sardar* v. *Kala Chand Bepari* (A. I. R. 1939 Cal. 728.[2]) At the same time, it seems to me that the occasions when the Court may properly allow a compromise and set aside convictions at this stage must be rare indeed. In the Sind case, the learned Judges said :

"The Court will always be reluctant to grant leave where it finds that an accused person has been rightly convicted. To allow compromises in such cases would have the effect of enabling offenders, and particularly convicted persons, to obtain their release from jail by bribing the complainant."

And they went on to observe,

"Had we been satisfied that the findings given by the appellate Court were findings of fact which could not be disturbed in revision, we would surely have refused to accept the compromise in this case."

In the Calcutta case, Edgley J. said :

"The exceptional power which has been conferred upon the High Court by sub-s. (5A) of S. 345, should not be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before the Court passed final orders in the case."

[6] I respectfully agree with these observations. In the present case it is not suggested that there was any attempt at compromise until after the accused had not only been convicted, but their appeal had been dismissed except for a reduction of the sentences.

[7] There is another difficulty with regard to the application before us. The convictions are not only for grievous hurt and hurt, but also under the rioting Sections 147 and 148. The offences under these sections are not compoundable at all, and, therefore, no acquittal could be allowed by reason of the compromise in regard to the convictions under these sections. To allow acquittals under the hurt sections would make no difference if the rioting convictions and sentences stand, except with regard to Gurunarayan Das, petitioner 1.

[8] There is, however, one feature of the present case which cannot be lost sight of, and that is the inordinate delay in the case. The offences took place as far back as March, 1942. It would be somewhat unreal to send the petitioners back to jail now to serve out their sentences, nearly four years after the offences. There seems to be no doubt that the parties have settled their differences, and it is stated that, if the compromise is allowed, there is some hope that the partition suit may also be amicably settled, and further litigation may be avoided. Taking these circumstances together, I am of opinion that this case may be regarded as exceptional, and in the circumstances I would allow the application to compound the offences under Ss. 325, 324 and 323 and direct that the petitioners be acquitted so far as those convictions are concerned. With regard to the convictions under Ss. 147 and 148, I would, in Gurunarayan Das's case, reduce the sentence of six months to the period of imprisonment already undergone, which I am informed is ten days, *plus* a fine of Rs. 100. I understand that this fine has already been paid, and we are asked to make an order that it should be refunded. The petitioner Gurunarayan has been found to have been the aggressor and he, certainly, inflicted a very serious injury, and I do not think any sufficient cause has been made out for remitting the fine. In the case of the remaining three petitioners, while maintaining the convictions under Ss. 147 and 148, I would reduce the sentence to the period of imprisonment already undergone.

**Bennett J.**—I agree. It is as important that justice should appear to be done as that it should be done. In sending these petitioners to prison now to serve out short sentences of 3, 6 and 9

months, four years after the date of the offences, in the circumstances, where the aggrieved persons are not only willing but have arrived at an agreement to compromise, the whole position appears to me to contain a large element of incongruity. I think that sub-s. (5A) of S. 345, Criminal P. C., was designed to meet just the kind of exceptional case as is presented in this revision. I, therefore agree that the compromise should be sanctioned and that the sentences under Ss. 147 and 148 should be reduced and altered as suggested by my learned brother.

D.S./D.H. *Order accordingly.*

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## A. I. R. (35) 1948 Patna 60 *[C. N. 22.]*

BENNETT AND BEEVOR JJ.

*Sadei Sahu — Defendant — Appellant* v. *Chandramani Dei and another — Plaintiff and Defendant — Respondents.*

Appeal No. 9 of 1940, Decided on 17-2-1947, from appellate decree of Addl. Sub-Judge, Cuttack, D/- 31-8-1939.

**(a) Transfer of Property Act (1882), Ss. 52 and 54—Sale deed executed before institution of suit—Registration pending suit—Lis pendens—Registration Act (1908), S. 47.**

Section 47, Registration Act, can only be read together with S. 54, T. P. Act, on the basis that the transfer by registered instrument under S. 54, once effected, relates back to the date of execution or other conventional date. Hence, a deed of sale executed before the institution of the suit for specific performance of a prior contract for sale of the same property but registered thereafter cannot be held to be executed pendente lite: 14 A. I. R. 1927 P. C. 42 and 25 A. I. R. 1938 Pat. 134, *Rel. on.* [Paras 3 and 4]

**Annotation.** — ('45-Com.) T. P. Act, S. 52, Note 29, Pts. 1 and 2.

**(b) Registration Act (1908), S. 47 — Effect of, on rights of third parties.**

Section 47 not only operates between the parties to the deed but affects the rights of third parties as well: 14 A. I. R. 1927 P. C. 42 and 25 A. I. R. 1938 Pat. 134, *Rel. on*; 23 A. I. R. 1936 Cal. 17; 28 A. I. R. 1941 Cal. 78 and 21 A. I. R. 1934 Rang. 216, *Dissent.* [Para 6]

**Annotation.** — ('45-Com.) Reg. Act, S. 47, Note 7, Pt. 2.

**(c) Trusts Act (1882), S. 91—"To the extent necessary to give effect to the contract"—Meaning of.**

The words "to the extent necessary to give effect to the contract" mean to the extent necessary to give effect to the only means that exist of enforcing the contract, namely, a suit for specific performance. Once, therefore, the remedy by way of specific performance is barred under Art. 113, Limitation Act, the person to whom the vendor first contracted to sell the property has no further or other remedy such as a suit for possession: 9 A. I. R. 1922 P. C. 345, *Rel. on*; 9 A.I.R. 1922 Cal. 412, *Dissent.* [Para 7]

*Cases referred :—*

1. ('27) 8 P. L. T. 327 : 14 A. I. R. 1927 P. C. 42 : 50 Mad. 198 : 54 I. A. 89 : 100 I. C. 105 (P. C.), Kalyanasundaram Pillai v. Karuppa Mooppanar.
2. ('38) 19 P. L. T. 383 : 25 A. I. R. 1938 Pat. 134 : 174 I. C. 372, Faiyazuddin Khan v. Mt. Zahur Bibi.
3. ('36) 23 A. I. R. 1936 Cal. 17 : 62 Cal. 979 : 160 I. C. 730, Naresh Chandra v. Girish Chandra.
4. ('41) 28 A. I. R. 1941 Cal. 78 : I. L. R. (1940) 2 Cal. 270 : 193 I. C. 530, Gobardhan Bar v. Gunadhar Bar.
5. ('34) 21 A. I. R. 1934 Rang 216 : 12 Rang. 263 : 151 I. C. 670, U Ba Sein v. Maung San.
6. ('22) 45 Mad. 641 : 9 A. I. R. 1922 P. C. 345 : 49 I. A. 335 : 68 I. C. 172 (P. C.), Subbaraya Pillai v. Raja of Karvetnagar.
7. ('31) 10 Pat. 851 : 18 A. I. R. 1931 P. C. 196 : 58 I. A. 279 : 133 I. C 705 (P. C.), Chhatra Kumari Devi v. Mohan Bikram Shah.
8. ('21) 34 C. L. J. 79 : 9 A. I. R. 1922 Cal. 412 : 49 Cal 495 : 67 I. C. 108, Jahar Lal v. Jatindra Nath.
9. (1857) 1 De. G. & J. 566 : 26 L. J. Ch. 797 : 6 W. R. 1, Bellamy v. Sabine.
10. ('12) 17 C. L. J. 427 : 16 I. C. 359, Pramatha Nath v. Jagannath Kisore.

*B. K. Pal* — for Appellant.

*B. N. Das and N. Das* — for Respondents.

**Bennett J.**—This is an appeal from a decision of the Additional Subordinate Judge, Cuttack, reversing the judgment of the Munsif of the 1st Court, Cuttack, in a suit instituted by the respondent under O. 21, R. 103, Civil P. C., for a declaration that the decree obtained by the appellant in original Suit No. 242 of 1930 of the latter Court is not binding upon her and for a permanent injunction against the appellant restraining him from taking delivery of possession of the disputed property in execution of the said decree.

[2] The facts of the case are as follows. On 5-12-1927, one Alekh Sahu agreed to sell the disputed property to the appellant. On 20-6-1930, Alekh Sahu entered into a second agreement under which he contracted to sell the disputed property to the respondent and on 16-7-1930, he executed a deed of sale thereof to the respondent who thereafter entered into possession and her name appears in the Current Settlement Record of Rights. There are concurrent findings of fact of the two Courts below, which were not disputed before us, that the respondent at the date of her purchase had notice of the prior sale to the appellant. On the same day, 16-7-1930, but subsequent to the actual execution of the above-mentioned deed of sale to the respondent, the appellant instituted O. S. No. 242 of 1930 against Alekh Sahu claiming specific performance of the contract of sale of 5-12-1927. In his evidence the appellant as D. W. 3, admitted that on 16-7-1930, when he instituted O. S. No. 242 of 1930, he was aware of the prior execution on that day of the deed of sale to the respondent. He did not, however, see fit to implead the respondent in that suit. On 19-7-1930, three days after the institution by the appellant of O. S. No. 242 of 1930, the deed of sale to the respondent was duly registered. The appellant's claim in O. S. No. 242 of 1930 against Alekh Sahu for specific performance of the agreement of 5-12-1927, was duly decreed and

a registered kebala was duly executed in his favour by the Munsif of the 1st Court. On his application for delivery of possession, the respondent intervened under S. 151, Civil P. C., and prayed that delivery of possession be refused. His claim was dismissed on the ground that the deed of sale to him of 16-7-1930, was executed pendente lite. He therefore commenced the present suit.

[3] The first point taken by Mr. B. K. Pal on behalf of the appellant was that the sale to the respondent was pendente lite in that the deed of sale was not registered until three days after the institution of suit NO. 242 of 1930. He argued that since S. 54, T. P. Act, 1882, provides that a sale of tangible immovable property can only be made by a registered instrument, it follows as of course that the date of the transfer for the purposes of S. 52 of that Act, which enunciates the doctrine of lis pendens, must be the date of registration. This argument however entirely ignores S. 47, Registration Act, 1908, which itself repeats the corresponding provision of the earlier Registration Acts of 1864, 1866, 1871 and 1877 and which provides as follows:

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

[4] This section can only be read together with S. 54, T. P. Act, 1882, on the basis that the transfer by registered instrument under S. 54, T. P. Act, 1882, once effected, relates back to the date of execution or other conventional date. That this is so, is, in my opinion, clear from the decision of the Judicial Committee in 8 P. L. T. 327[1] and from the application of that decision made by a Division Bench of this Court in 19 P. L. T. 383.[2] In the case in the Privy Council, it was held that where a Hindu governed by the Mitakshara School executed a deed of gift and made it over to the donee, who accepted the gift, but prior to registration the donor adopted a son, the adoption did not render the gift inoperative, although the gift had not been registered before adoption. The ratio decidendi of their Lordships' decision was stated by Lord Salvesen as follows:

"They (their Lordships) are unable to see how the provisions of S. 123, T. P. Act, can be reconciled with S. 47, Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with."

[5] The provisions of S. 123, T. P. Act, 1882, which govern the mode of a valid transfer of immovable property by way of gift, are as categorical and mandatory in their terms as are those of S. 54 of that Act and I am of opinion that they cannot be distinguished in their relation to S. 47, Registration Act. That this is so, follows clearly from the decision of this Court above referred to in 19 P. L. T. 383[2] where in reliance upon the decision of the Judicial Committee above quoted, it was held that where a deed relating to certain properties requiring registration was executed and before it could be registered the properties were attached, the attachment did not prevail against the deed or prevent registration thereof and that when registered the deed took effect from the date of its execution.

[6] Mr. B. K. Pal argued strenuously that S. 47, Registration Act, 1908, operated only as between the parties to the deed and did not affect the rights of third parties and he referred to the decisions in A. I. R. 1936 Cal. 17,[3] A. I. R. 1941 Cal. 78[4] and A. I. R. 1934 Rang. 216.[5] In so far as those decisions turn upon the wording of some other statutory provisions, such as S. 54, Provincial Insolvency Act, 1920, and S. 26F, Ben. Ten. Amendment Act, 1938, they are no guide to the present question, but in so far as they purport to interpret S. 47, Registration Act, 1908, they appear to me, if I may say so respectfully, to be inconsistent with the decision of the Privy Council in 8 P. L. T. 327[1] and of this Court in 19 P. L. T. 383,[2] above referred to. In both these cases the effect of S. 47 upon the right of a third party was directly in issue and the immediate subject of the decision.

[7] Mr. B. K. Pal next contended that he was entitled to rely upon S. 91, Trusts Act, 1882, and that thereunder the respondent must be deemed to hold the property in dispute in trust for the appellant. In so far as this contention, in the circumstances of this case, can be said to aid the appellant, it must mean that by virtue of S. 91, Trusts Act, 1882, a person to whom the owner has contracted to sell immovable property is entitled to sue a subsequent transferee thereof with notice for possession of the immovable property without claiming or first obtaining a decree for specific performance of the contract, but that proposition refutes itself. Under S. 27 (b), Specific Relief Act, the vendor of immovable property is just as much a trustee for the person with whom he contracts for the sale thereof as is a subsequent purchaser thereof under S. 91, Trusts Act, 1882, but, as the decision of the Judicial Committee in 45 Mad. 641[6] makes abundantly apparent,

the only remedy of such a person against a vendor is a suit for specific performance. By purchasing with notice of the prior agreement, the subsequent purchaser assumed all the obligations of the vendor, but he does not assume any greater obligation. The words 'to the extent necessary to give effect to the contract' in S. 91, Trusts Act, 1882, mean, therefore, to the extent necessary to give effect to the only means that exist of enforcing the contract, namely, a suit for specific performance. The trust created by S. 91, Trusts Act, 1882, arises by operation of law and, as the decision of the Judicial Committee in 10 Pat. 851[7] shows, is not a trust for a specific purpose within the meaning of S. 10, Limitation Act, 1908. Once, therefore, the remedy by way of specific performance is barred under Art. 113 of Sch. 1 to the Limitation Act, 1908, the person to whom the vendor first contracted to sell the property has no further or other remedy. Mr. B. K. Pal sought to distinguish the case where such a person has obtained a decree for specific performance against the vendor and cited the dictum of Mookerjee J. in 34 C. L. J. 79,[8] where that very learned Judge appears to have laid down a general proposition of law to the effect that when a suit for specific performance is ended by a final decree transferring the title, that title dates back to the date of the agreement on which the suit is based and that the Court will not permit its decree to be rendered nugatory by intermediate conveyances. It is to be remarked that if that proposition is accepted at its face value, it renders S. 52, T. P. Act, 1882, largely, and S. 91, Trusts Act, 1882, entirely redundant, since it extends the doctrine of lis pendens in such a case beyond the actual pendency of the suit to the period between the date of the agreement on which a suit for specific performance is based and the date of the institution of the suit. It is only by some such extension of the doctrine of lis pendens that the suggested distinction can be maintained, because the suit and decree for specific performance against the vendor is *res alios inter acta qua* the subsequent purchaser and cannot otherwise affect his rights, but, the doctrine never has and, within the ordinary meaning of the expression lis pendens, never could be so extended. Both in the law of India as set out in S. 52, T. P. Act, 1882, and in the law of England, upon which the section is based, as enunciated by Turner L. J., in (1857) 1 De. G. & J. 566,[9] the operation of the doctrine is restricted to the period of the lis. Nor can it be suggested that having obtained the decree for specific performance against the vendor, the purchaser under the decree in instituting a suit for possession against the original subsequent purchaser on the basis of the decree is doing no more than enforcing his original contract for the enforcement of which the subsequent purchaser holds the property in trust. The original contract with the vendor has merged in the decree and in such a suit it is not his original contract which the purchaser under the decree is seeking to enforce but the decree itself which he has obtained in a suit to which the subsequent transferee was not a party. The point is really elemental and looking at the actual decision in 34 C. L. J. 79[8] I am very doubtful if Mookerjee J. really intended to do more than enunciate the ordinary doctrine of lis pendens, because it was not necessary for the purposes of that case in any way to extend the doctrine, the subsequent purchase there in question being clearly effected after the date of the suit for specific performance, as was also the case in 17 C. L. J. 427[10] on which the learned Judge specifically relied for the proposition he enunciated.

[8] For the above reasons, I would dismiss the appeal with costs.

**Beevor J.** — I agree.

D.H. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 62** *[C. N. 23.]*

DAS AND DALZIEL JJ.

*Akal Sahu—Appellant* v. *Emperor.*

Criminal Appeal No. 311 of 1946, Decided on 12th December 1946, from decision of Sessions Judge, Monghyr, D/- 10-6-1946.

**(a) Criminal P. C. (1898), S. 162—Applicability—Section applies to statements made by accused person if other conditions of the section are satisfied: 26 A. I. R. 1939 P. C. 47, *Foll*; 14 A. I. R. 1927 Cal. 17 and 15 A. I. R. 1928 Pat. 473, *Held overruled by* 26 A.I.R. 1939 P. C. 47.** [Para 4]

**Annotation: ('46-Com.) Cr. P. C., S. 162, N. 4 Pt. 14.**

**(b) Evidence Act (1872), Ss. 17, 21, 25 — Statement of accused — Admissibility as admission by person subsequently charged as accused—Criminal P. C., S. 162.**

The statement of a person subsequently accused of an offence even if it does not come under S. 32, Evidence Act, may be admissible in evidence as an admission provided it is excluded by the sections of the Evidence Act relating to the confession of an accused person or by S. 162, Criminal P. C. Similarly before admitting a portion of a statement care must be taken to see that that portion is not so connected with the confessional portion as to be inseparable from it: 27 A. I. R. 1940 Pat. 163, *Foll.*; *Case law discussed.* [Para 6]

Where a person accused of murdering the deceased with a *bhala*, stated in his first information to the police long before the police got information of the alleged occurrence that some unknown thief had cut a portion of his maize crop and he had assaulted that thief with a *bhala* and given him one blow with it:

*Held*, the statement was neither a confession, nor hit by S. 162, Criminal P. C., and could be admitted in evidence as an admission. [Para 7]

**(c) Penal Code (1860), S. 300, Excep. 2 — Last clause is corollary of S. 99, Penal Code — Private**

**defence does not extend to inflicting more harm than necessary—Damage to crop — Owner hitting person with *bhala* penetrating lung — Right of private defence is exceeded — Case is not covered by exception.** [Para 8]

*Cases referred*:—

1. ('27) 54 Cal. 237 : 14 A. I. R. 1927 Cal. 17 : 99 I. C. 227, Azimaddy v. Emperor.
2. ('29) 9 P. L. T. 449 : 15 A. I. R. 1928 Pat. 473 : 111 I. C. 721, Raj Kumar Singh v. Emperor.
3. ('39) 26 A. I. R. 1939 P. C. 47: 18 Pat 234: 1941 Rang. L. R. 789*n* : I. L. R. (1939) Kar. 123 : 66 I. A. 66 : 180 I. C. 1 (P.C.), Pakala Narayanaswami v. Emperor.
4. ('17) 44 Cal. 876 : 4 A. I. R. 1917 P. C. 25 : 13 N. L. R. 100 : 44 I. A. 137 : 39 I. C. 311 (P.C.), Dal Singh v. Emperor.
5. ('22) 49 Cal. 167 : 9 A. I. R. 1922 Cal. 342 : 62 I.C. 578, Legal Remembrancer, Bengal v. Lalit Mohan Singh.
6. ('14) 41 Cal. 601: 2 A. I. R. 1915 Cal. 256 : 26 I. C. 161, Emperor v. Kangal Mali.
7. ('35) 22 A. I. R. 1935 Bom. 26 : 59 Bom. 120 : 154 I. C. 621, Harnam Kisha v. Emperor.
8. ('41) 28 A. I. R. 1941 Nag. 86 : I. L. R. (1940) Nag. 679 : 193 I. C. 6, Bharosa Ramdayal v. Emperor.
9. ('40) 27 A. I. R. 1940 Pat. 163 : 19 Pat. 301 : 188 I. C. 57, Emperor v. Kommoju Brahman.
10. ('45) 32 A. I. R. 1945 Sind 132 : I. L. R. (1944) Kar. 456 : 221 I. C. 358, Gopaldas Shivalomal v. Emperor.
11. ('31) 18 A. I. R. 1931 Lah. 763 : 133 I. C. 55, Abdul Ghani v. Emperor.

*M. K. Mukherji* — for Appellant.

*Tarkeshwar Nath* — for the Crown.

**Das J.** — The appellant, Akal Sahu, aged about 30-35, has been found guilty of the offence of murder under S. 302, Penal Code, and has been sentenced to transportation for life by the learned Sessions Judge of Monghyr. He was tried with two other persons, Bhagirath Mandal and Narain Sahu, both of whom have been acquitted by the learned Sessions Judge. The trial was held with the aid of four assessors who were of the opinion that the appellant was not guilty. The learned Sessions Judge, in disagreement with the opinion of the assessors has found the appellant guilty of the offence of murder with which he was charged.

[2] It was alleged against the appellant that he had killed one Damodar Mandal at about 8-30 P. M. on 26th August 1945 in the following circumstances. [His Lordship then set forth the facts of the case and the contentions of the two sides and after discussing the evidence proceeded as follows.]

[3] Turning now to the defence version, there is the first information which the appellant Akal Sahu had given at the thana at 7 A. M. on 27th August 1945. The question is whether this first information is admissible in evidence. Learned counsel for the appellant has contended first, as a general principle, that the previous statement of a person, who is subsequently accused of an offence and is thus rendered incapable of giving evidence on oath, is not admissible in evidence in a case against him, unless it comes under any of the provisions of S. 32, Evidence Act, and secondly, that the information given by the appellant in this case is of the nature of a confession and, therefore, inadmissible in evidence under S. 25, Evidence Act. As the question of the admissibility of an information given by a person, who subsequently figures as an accused, often arises in criminal trials, I propose to consider this question in some detail. I may say at once that the first contention of learned counsel, in the wide terms in which it has been stated by him, finds no support from the provisions of the Evidence Act. Section 17, Evidence Act, explains what is meant by an admission: it states that an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons, and under the circumstances hereinafter mentioned. Section 18, etc., indicate the persons and circumstances referred to in the concluding part of S. 17; for example, statements made by a party to a proceeding or by an agent to any such party are admissions. Section 21 states *inter alia* that admissions are relevant and may be proved as against the person who makes them: certain exceptions are provided in which an admission may be proved by or on behalf of the person making it. Under the aforesaid provisions, the statement of a person, who subsequently figures as an accused, may be admissible in evidence as an admission if the statement suggests any inference as to any fact in issue or relevant fact. Ordinarily, such an admission may be proved against the person who makes it but in certain exceptional circumstances mentioned under S. 21, Evidence Act, the admission may be proved by or on behalf of the accused person.

[4] The aforesaid general provisions regarding admissions are, however, subject to certain excluding sections, such as, S. 24, S. 25 and S. 26, Evidence Act. These sections deal with a confession made by an accused person. The word 'confession' has not been defined in the Evidence Act, and I shall presently discuss what is a confession. It is, however, clear, as has been observed in several decisions, that 'confessions' are a subspecies of 'statements,' and a species of admissions. If, therefore, the statement of a person, who is subsequently accused of an offence, whether the statement is embodied in a first information or not, is of the nature of a confession and comes within the provisions of any of the excluding sections mentioned above, then the statement is clearly not admissible in evidence. This general statement is again subject to S. 27, Evidence Act, which is a proviso to the preceding sections.

Besides the sections of the Evidence Act referred to above, there is another section, S. 162, Criminal P. C., which may exclude the statement of a person made to a Police Officer in the course of an investigation, even though the statement is treated as a first information and is made by a person who is subsequently accused of an offence. The test for the application of S. 162, Criminal P. C., would be if the statement was made to a Police Officer in the course of an investigation. At one time it was thought that S. 162, Criminal P. C., did not apply to statements made by an accused person: *vide* the decisions in 54 Cal. 237,[1] 9 P. L. T. 449[2] and certain other decisions. In view of the decision of their Lordships of the Judicial Committee in A. I. R. 1939 P. C. 47,[3] those decisions must be considered to have been overruled and S. 162, Criminal P. C., will apply to the statement of an accused person if the other conditions of the section are fulfilled. The position, therefore, comes to this. The statement of a person, who is subsequently accused of an offence, may be admissible in evidence as an admission provided it is not of the nature of a confession and does not come within the excluding sections of the Evidence Act, or is not hit by S. 162, Criminal P. C. Such a statement may also be admissible under other sections of the Evidence Act, e. g., S. 8, Expln. 1.

[5] Turning now to some of the decisions which have been placed before us, I refer first to a decision of their Lordships of the Judicial Committee in 44 Cal. 876.[4] In this case it was argued before their Lordships that the information given to the police by the appellant (that is, the accused person) was not admissible in evidence under S. 25, Evidence Act, being a confession to a Police Officer and tending to prove the guilt of the appellant. Dealing with the argument their Lordships said as follows:

"It is important to compare the story told by Dal Singh when making his statement at the trial with what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an information or charge laid against Mohan and Jhunni in respect of the assault alleged to have been made on Dal Singh on his way from Hardua to Jubbulpore. As such the statement is proper evidence against him."

In 49 Cal. 167[5] the main question for consideration was the application of S. 27, Evidence Act. Their Lordships were dealing with a first information given by a person who himself admitted having hit his wife with a sword: the information also contained statements relating to certain antecedent events. Dealing with the argument that the statement, as a whole, was hit by S. 25, Evidence Act, their Lordships stated as follows:

"That by reason of the provisions of S. 25, Evidence Act, the first information is not admissible in its entirety is conceded. But it is contended that the preliminary portions of the first information, giving a history or narrative of events preceding the night of 23rd March, are admissible as statements or admissions not being confessions, and that of the second half of the first information, such portions as led to discovery, e. g., in the bed-room, of the dead woman's body, the sword and a certain padlock, are admissible under the provisions of S. 27, Evidence Act."

Their Lordships referred to S. 21, Evidence Act, in support of the contention that part of the first information was admissible as containing admissions not being confessions, and also to certain earlier decisions of the Calcutta High Court, such as, 41 Cal. 601.[6] The decision in 49 Cal. 167[5] has been the subject of some comment in other decisions, particularly as respects that part of the decision which allows the statement of an accused person to be divided or separated—the non-confessional from the confessional portion. In A. I. R. 1935 Bom. 26[7] Beaumont C. J. (as he then was) expressed his doubt about the correctness of the principle on which the Calcutta High Court proceeded in 49 Cal. 167,[5] in the following words:

"Section 25, Evidence Act, seems to be founded on the view of the legislature that confessions made to a Police Officer are suspect, since they may have been induced by improper pressure. If that be the true underlying principle of S. 25 it is, to my mind, very difficult to see how any part of the confessional statement can be admitted in evidence."

In A. I. R. 1941 Nag. 86[8] the following observations have been made with reference to the aforesaid criticism of Beaumont C. J. (as he then was):

"With the greatest respect we do not consider that the doubt there expressed was justified..... The confessions in those cases and in the one which we are considering were made in circumstances which preclude any possibility of improper pressure, as in each case the accused person went of his own accord to the police station before any suspicion had been aroused and stated that he had killed some one, and in 49 Cal. 167[5] that part of the confessional statement which was admitted had no connection with the actual narrative relating to the crime."

It is clear that before admitting a portion of a statement, care must be taken to see that that portion is not so connected with the confessional portion as to be inseparable from it. This has also been pointed out in A.I.R. 1940 Pat. 163[9] where it has been observed that the principle in 49 Cal. 167[5] is not applicable in a case where no parts of the first information report can be extracted from the rest, and be relevant in themselves and admissible as not being incriminatory. In A.I R. 1945 Sind 132[10] the first information of a person, who was subsequently accused of an offence, was admitted in evidence on the ground that it was not a confession, and a reference was made to the decision of their Lordships of the

Judicial Committee in 44 Cal. 876.[4] In A. I. R. 1931 Lah. 763[12] it has been observed that a statement made by a person, at the time when he was not an accused, which in no way connects him with the offence, is not a confession ; but if the person subsequently becomes an accused and the statement is tendered in evidence against him, it must be treated in exactly the same way as if he had been an accused at the time he made it: although reliance is placed upon the truth of the statement so far as a portion is concerned, that does not invalidate the statement if it is not incriminating in itself, and such a statement is admissible under the general rule as an admission.

[6] From a consideration of the case law discussed above it is clear that the first contention of learned counsel for the appellant that the statement of a person, who is subsequently accused of an offence, cannot be admitted in evidence, unless it comes under S. 32, Evidence Act, is not correct. The statement may be admissible in evidence as an admission, provided it is not hit by the excluding sections of the Evidence Act relating to the confession of an accused person or by S. 162, Criminal P. C. The first information which the appellant gave in this case is clearly not hit by S. 162, Criminal P. C. It was given at 7 A. M. on 27-8-1945, long before the Sub-Inspector had any information of the occurrence as alleged by the prosecution. The statement was not, therefore, by a person in the course of an investigation. Learned counsel has then contended that the first information is of the nature of a confession, and that no part of it is separable from the rest, so as to attract the rule laid down in 49 Cal. 167.[5] The first information reads as follows :

"That I have got a maize field of about 4 kathas in the bahiar of mouza Nirpur. Last night when I was watching my maize field at about 10 p.m. I heard a rattling sound in the fields to the northern side of the *machan*. At this I armed with a *bhala*, went towards that side. Hearing the sound of my footsteps, the thief ran away. I gave him one *bhala* blow. The thief whom I could not identify fled away towards the north crying 'bap re bap' (O father) and leaving behind in the field a small bundle of maize valued at about Re. 1 which was cut by the unknown thief. I also raised outcries 'run, I struck the thief. I struck the thief'. On the outcries being raised by me, Asman Mandal, son of Harpad Mandal, Baijnath Mandal, son of Bansi Mandal, Baijnath Mandal, son of Akal Mandal, Bandhi Mandal, son of Raman Mandal, and other residents of Nirpur came, and I told them all about the occurrence. The maize, which was cut by the thief, is still lying in the field. The unknown thief was of medium stature and was wearing a *kurta* and a *dhoti*. The head was bare. I do not suspect any person. The *bhala* with which I assaulted the thief is in my house. I cannot say which part of the thief's body was hit by the bhala."

The question is whether it is of the nature of a confession. I can do no better than quote here certain observations of their Lordships of the Judicial Committee as to the meaning of the expression "confession," occurring in A.I.R. 1939 P. C. 47[3] :

"As the point was argued, however, and as there seems to have been some discussion in the Indian Courts on the matter it may be useful to state that in their Lordships' view no statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not itself a confession e. g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of 'confession' in Art. 22 of Stephen's 'Digest of the Law of Evidence' which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author, after dealing with admissions generally, is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872 : and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed' the crime."

Applying the test laid down by their Lordships, it appears to me that the information given by the appellant in this case was in no sense a confession. The appellant did not confess to having committed any crime, much less the crime with which he was charged. He merely stated that he had hit an unknown thief who was committing theft of *makai* crop.

[7] Learned counsel for the appellant has referred us to certain decisions where it has been observed that a useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution; if the prosecution rely on the statements of the accused to the police as being true, then they may, and probably in many cases will, be found to amount to confessions; if, on the other hand, the statements of the accused are relied on, not because of their truth, but because of their falsity, they are admissible as admissions. Speaking for myself and with all deference I doubt if the test referred to above can be said to be an absolute or universal test ; it is difficult to understand how a statement becomes admissible as an admission merely because of its falsity. As has been observed in A.I.R. 1931 Lah. 763,[11] the mere fact that reliance is placed upon the truth of the statement so far

as a portion is concerned, does not invalidate the statement if it be not incriminatory in itself. In the case before us all that the appellant admits in his first information is that some unknown thief had cut a portion of his maize crop, and he had assaulted that thief. No part of the statement is a confession, and it is admissible as an admission, because it suggests an inference as to a fact in issue or relevant fact. As I have stated above, the appellant has made substantially the same statement before the Committing Magistrate. This version of the occurrence as given by the appellant at the earliest stage is different from his defence at the trial, and is not supported by any evidence in the record, except that of the Sub-Inspector of Police who found that a small part of the crop had been cut in an irregular manner. Even if a portion of the appellant's statement is true, it is not a confession. I am, therefore, of the opinion that the learned Sessions Judge was right in admitting the said first information in evidence. I may also state that even if the first information is altogether excluded from consideration, the prosecution case is still proved by the dying declarations of Damodar Mandal and the evidence of Bhubneshwar Missir (P. W. 3) to which I have already made a reference.

[8] The only other point that remains for consideration is the question of the offence which the appellant has committed in hitting Damodar Mandal on the chest with a *bhala*. It has been very seriously contended before us that the offence is one under S. 304, Penal Code. Learned counsel for the appellant has stated that if the first information of the appellant is admitted in evidence it shows that a thief was stealing the appellant's *makai* crop, and, therefore, the appellant had a right of private defence against such theft, and if he has exceeded that right, his case comes under Excep. 2 of S 300, Penal Code. He has also pointed out that the evidence of the investigating Police Officer shows that some part of the *makai* crop of the appellant was cut in an irregular fashion. I have given this point a very careful consideration. I have already pointed out that there is no evidence on which it can be held that Damodar was stealing Akal's crop that night. One may feel sympathy for a person whose crop, almost ripe for harvesting, is either damaged by cattle or is cut by a thief. I am unable, however, to hold that Excep. 2 of S. 300, Penal Code, applies in this case. Moreover Excep. 2 contains the important clause "without any intention of doing more harm than is necessary for the purpose of such defence." This clause is a necessary corollary of S. 99, Penal Code, which says that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Even though the damage of ripe crops can be very exasperating, it does not give the right to kill a person. The appellant hit Damodar Mandal on the chest with a *bhala* with such force that the left lung was penetrated. The opinion of the doctor was that the injury was sufficient in the ordinary course of nature to cause death, though Damodar Mandal died some days after the infliction of the injury. Nor can it be said that the appellant had such grave and sudden provocation as to deprive him of the power of self-control. For these reasons, I am unable to hold that the offence is one under S. 304, Penal Code. In my opinion, the learned Sessions Judge has rightly found the appellant guilty of the offence under S. 302, Penal Code, and, in the circumstances of this case, he has rightly imposed on him the lesser sentence of transportation for life.

[9] The result, therefore, is that I would uphold the conviction and sentence passed upon the appellant and dismiss the appeal.

**Dalziel J.**—I agree.

D.R. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 66** *[C. N. 24.]*

BEEVOR J.

*Kamiruddin Khan — Petitioner* **v.** *Sachidananda Jena and another—Opposite Party.*

Civil Revn. No. 90 of 1945, Decided on 10-2-1947, from order of Dist. Judge, Cuttack, D/- 8-1-1945.

**Civil P. C. (1908), O. 21, R. 89 (as amended by Allahabad High Court)—"Any person holding any interest in the property" — Meaning of — Hindu wife.**

**Under Mitakshara School of Hindu law a wife, though she cannot herself demand a partition, is entitled to receive a share equal to that of a son if a partition takes place between her husband and his sons. This shows that the wife has a certain interest in the property, even if it may be regarded as a contingent interest. Hence the wife can apply and make a deposit under O. 21, R. 89.** [Para 2]

**Annotation.** — ('44-Com.): Civil P. C., O. 21, R. 89 Note 15, Pt. 4.

*Cases referred :—*

1. ('12) 13 I. C. 404 (All.), Sarvai Begam v. Haider Shah
2. ('31) 132 I. C. 808 : 18 A. I. R. 1931 All. 449, Ibne Hasan v. Din Dayal.

*M. S. Rao* — for Petitioner.

*D. Sahu* — for Opposite Party.

**Order.** — The petitioner is a decree-holder auction purchaser who on 16-3-1944 purchased a certain zemindari interest of his judgment-debtor 1 for Rs. 40. At the time in question judgment-debtor 1 was a security prisoner under R 26, Defence of India Rules. He is now opposite party 1. On 15-4-1944 opposite party 2, wife of opposite party 1, filed a petition and made the

necessary deposits which would be sufficient to set aside the sale under O. 21, R. 89 and on her petition and deposit the sale has been set aside. Hence the petition to this Court which is urged on the ground that opposite party 2 had no authority to file the petition or to make the deposit. Rule 89 of O. 21 as amended by this Court starts with the words

"where immovable property has been sold in execution of a decree, the judgment-debtor or any person deriving title from the judgment-debtor or any person holding any interest in the property may apply to have the sale set aside on his deposit in Court . . . . ."

The lower appellate Court proceeded on the basis that the wife could be treated as the agent of her husband, judgment-debtor 1. I do not think that this view is correct in view of the provisions of O. 3, R. 1, Civil P. C., read with R. 2, because the wife is not the recognised agent within the meaning of R. 2 of O. 3.

[2] Mr. Sengupta appearing for the opposite party has not attempted to support the decision on the basis of agency, but he has contended that the wife has an interest in her husband's property sufficient to enable her to make a deposit under O. 21, R. 89, Civil P. C. Mr. Rao on behalf of the petitioner has pointed out that it has been held in civil cases that unless a person actually has an interest in the property deposit by him under O. 21, R. 89 is invalid. He cited the decisions in 13 I. C. 404[1] and 132 I. C. 808.[2] The latter was a case of a deposit made by a person looking after the zemindary property of the judgment-debtor. Mr. Sen Gupta relied on a passage from Hindu Law by Golap Chandra Sarkar Sastri, 7th Edn., 1936, p. 370 under the heading "Wife's right to husband's property." The author therein states :

"The *Patni* or lawfully wedded wife acquires from the moment of her marriage a right to everything belonging to the husband, so as to become his co-owner. But her right is not co-equal to that of the husband but is subordinate to the same, and resembles the son's right to the father's self acquired property."

and he goes on to make certain comments on this right. It is, to my mind, unnecessary to consider how far that passage represents the true position of wife as regards her husband's property, because it is well settled that under the Mitakshara School of Hindu law which would govern the parties to this case, although a wife cannot herself demand a partition, if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son. It seems to me therefore that this shows that the wife has a certain interest in the property even if it may be regarded as a contingent interest. I see no reason to read the word interest under O. 21, R. 89, Civil P. C., very narrowly. Moreover it is in my opinion (not ?) necessary to decide definitely that the wife had a right to apply and made the deposit. It is sufficient to state that the opposite proposition is not so clearly the law as to require any interference by me in revision. This petition is therefore dismissed with costs. Hearing fee one gold mohur.

D. H. *Petition dismissed.*

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**A. I. R. (35) 1948 Patna 67** *[C. N. 25.]*

BENNETT AND BEEVOR JJ.

*Lingaraj Santra and others* — *Petitioners* v. *Joykrishna Mahapatra*—*Opposite Party.*

Civil Revn. No. 182 of 1943, Decided on 10-1-1947, from order of Agency Sub-Judge, Jeypore, D/- 9-8 1943.

**Madras Presidency Agency Rules, Rr. 48 and 49—'Decree'—Meaning of—Order of remand—Civil P. C. (1908), S. 2 (2).**

The word 'decree' where it appears in the Agency Rules means the formal expression of an adjudication which so far as the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit. The order of the Agency Subordinate Judge, passed on appeal from a decree of the Additional Agency Munsif, setting aside the judgment and decree and remanding the suit for disposal according to law after giving an opportunity to the parties to produce further evidence on certain points is not a decree: 4 A.I.R. 1917 Mad. 452, *Rel. on; Case law discussed.* [Para 17]

Annotation ('44-Com.) C. P. C. S. 2 (2), Note 6, pt. 6.

*Cases referred* :—

1. ('16) 36 I.C. 801 : 4 A.I.R. 1917 Mad. 452, Vikrama Deo Garu v Maharaja of Jeypore.
2. ('18) 41 Mad. 325 : 5 A. I. R. 1918 Mad. 554 : 42 I. C. 555, Venkata Nagabushanam v. Mahalakshmi.
3. ('93) 16 Mad. 229, Jagannadha v. Gopanna.
4. ('03) 26 Mad. 266, Vikramadeo Maharajulum Garu v. Neladevi Pattamamahadevi Garu.
5. ('13) 36 Mad. 128 : 12 I. C. 73, Maharaja of Jeypore v. Raghunatha Patro.
6. ('44) 10 Cut L. T. 51 : 23 Pat. 442 : 31 A. I. R. 1944 Pat. 297, Marotu Guranna v. Kshetri Mohanty.
7. ('26) 30 C. W. N. 334 : 13 A. I R. 1926 Cal. 638 : 93 I. C. 909, Altaf Ali v. Jamsur Ali.

*B. N. Das*—for Petitioners

*Advocate-General*—for Opposite Party.

**Bennett J.**—This is an application for revision of an order of the Agency Subordinate Judge, Jeypore, on appeal from an original decree of the Additional Agency Munsif, setting aside the judgment and decree and remanding the suit to the Court of the Additional Agency Munsif for disposal according to law after giving an opportunity to the parties to produce further evidence on certain points.

[2] The Advocate-General, who appeared on behalf of the opposite party, has taken a preliminary objection based on the Madras Presidency Agency Rules published under S. 6, Scheduled Districts Act, 1874, that no revision or appeal to this Court lies in respect of the order of the Agency Subordinate Judge.

[3] The application of the Agency Rules to Agency area of Jeypore was not disputed by Mr. B. N. Das who appeared for the petitioner.

[4] The provisions of the Agency Rules relied upon by the learned Advocate-General are Rr. 11 (4), 1 (5), 48, 49 and 59. Rule 11 (4) enables the Agent to the Governor or the Government Agent to transfer any appeal pending in his Court to the Court of any Agency Divisional Officer subordinate to him, and this Rule is the basis of the jurisdiction in this case of the Agency Subordinate Judge. Rule 1 (5) states that the decisions of the Sub-Judge shall have the same force and shall be subject to appeal in the same manner and to the same extent as if they were passed by the Agent to the Governor or the Government Agent, as the case may be. Rule 48 provides for the case of second appeals from an original decree of a Court subordinate to the Government Agent or the Agent to the Governor as follows :

"From every decree passed by the Government Agent or the Agent to the Governor in appeal from an original decree passed by any Court subordinate to him an appeal shall lie to the High Court, on the grounds specified in section 100, Civil P. C.

Decrees passed by the Government Agent or the Agent to the Governor in second appeal from original decrees passed by Agency Munsifs shall be final but the High Court may for special reasons require him to review his judgment as they may direct."

[5] Rule 49 provides for a first appeal to the High Court "from every original decree" passed by the Agent to the Governor or the Government Agent as the case may be. Rule 59 provides for the revision of the proceedings of the Agent to the Governor or the Government Agent as follows :

"All petitions against the proceedings of the Agent to the Governor or the Government Agent in respect of matters not otherwise provided for in these rules must in the first instance be submitted to the Government (?) who may, if necessary, refer them to the High Court."

[6] It is conceded by the petitioners that no petition for reference to the High Court under the provisions of R. 59 has been submitted to the Governor and that this Court has, therefore, no jurisdiction to revise the order here in question. The learned Advocate-General has properly withdrawn any objection in form which might prevent the present petition from being considered as constituting an appeal under R. 48, Agency Rules, but he contends that the order here in question is not a decree within the meaning of that expression as used in that Rule and that, therefore, no appeal lies. The petitioners, on the other hand, contend that the order is such a decree and it is this issue which we have, therefore, to decide on the preliminary point. The learned Advocate-General has referred in support of his contention to a decision of the Madras High Court in 36 I.C. 801[1] where it was held that an order of the Agent to the Governor, Vizagapatam, remanding a case for disposal to the lower Court under the Agency Rules is not a decree and that the High Court cannot interfere under R. 20 of the then Agency Rules, corresponding to R. 48 of the present Agency Rules. The reasons for their judgment given by their Lordships of the Madras High Court were as follows :

"But we do not think that we can treat this order of remand as a decree. For, though the Code of Civil Procedure is not applicable the definition in it affords guidance which, in the absence of any other authoritative interpretation of the word, we are not prepared to disregard and that definition would not cover the order before us."

In 41 Mad. 325[2] it was held that an order passed by a Government Agent directing that a suit dismissed by an Assistant Agent for default of appearance of the plaintiff be restored to the file is not a decree within the meaning of R. 8, Agency Rules for the Godavari District which corresponds to R. 48 of the present Agency Rules, and is not revisable by the High Court by a petition filed directly in the High Court. Their Lordships of the Madras High Court relied upon the case reported in 36 I. C. 801[1] (above quoted) and decided that the order of the Agent setting aside the order of the Assistant Agent dismissing the suit for default was not an adjudication of the rights of the parties within the meaning of the definition of the decree given in Civil Procedure Code. At the conclusion of their judgment their Lordships remarked that the proper remedy of the petitioner was to submit a petition to the Government and it was for the Government, if it so chose, to refer the petition to the High Court for disposal.

[7] We were also referred to three other Madras cases, 16 Mad. 229,[3] 26 Mad. 266[4] and 36 Mad. 128[5] to the same effect.

[8] Mr. B. N. Das, who appeared for the petitioners, however, relies upon the decision of this Court in 10 Cut. L. T. 51=23 Pat. 442[6] where it was held that assuming that the Code of Civil Procedure is not applicable to the Agency area, Jeypore, still an appeal will lie under the Agency Rules from an order refusing an application to rehear an appeal decreed *ex parte*, and that though the order is not a decree within the definition of decree in the Civil Procedure Code and though there is no complete definition of decree in the Agency Rules, the ordinary dictionary meaning will prevail and the said order is a decree for the purpose of the Agency Rules and is appealable under R. 49. The reasons for the decision in this case given by Meredith J. do appear at first sight strongly to support the contention of the petitioners in the present case. After setting out R. 49, Agency Rules, Meredith J. dealt with the question whether the order in that case was or was not a decree within the meaning of R. 49, and observed thus :

"The question, therefore, is whether the order in the present case can under these Rules be regarded as a

decree. If we are to adopt the definition of decree in the Code of Civil Procedure, there can be no doubt that it is not a decree. But upon the assumption that the Code of Civil Procedure is not applicable the definition contained therein is also inapplicable and consequently for the meaning of 'decree' we must look to the Rules themselves, and, where they fail us, to the ordinary dictionary meaning of the word. There is no complete definition of 'decree' in the Agency Rules, but in the interpretation clause we find:

'Decree' shall include orders passed under Rr. 39 (1) and 43 (3) but not orders under Rr. 33 and 35.

This is not, in my opinion, an attempt at definition, but merely a specification of certain instances. What it does show, however, is that 'decree' is not used in the sense it is used in the Code of Civil Procedure, because an order under R. 43 (3) is made a decree. Rule 43 (3) merely provides that in certain cases of nonfeasance or misfeasance by receiver the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him, or any loss occasioned by him, and shall pay the balance, if any, to the receiver. This is clearly not a decree at all in the sense we are accustomed to in the Code of Civil Procedure.

In the absence of any complete definition we are, as I have said, forced to rely upon the ordinary dictionary meaning of the word. In Webster's dictionary 'decree' is defined as follows:

'An order of decision from one having authority deciding what is, or is to be, done; a determination by one having power deciding what is to be done or to take place; authoritative decision; imperative rule; edict; law; ordinance.'

It is clear, and Mr. Chatterji does not dispute, that the order of the Subordinate Judge in this case dismissing the application before him will fall within this definition as a determination from one having authority deciding what is to be done or to take place, and as an authoritative decision."

[9] The meaning of the word "decree" in R. 49, Agency Rules, enunciated by his Lordship is very wide, and since the word "decree" in R. 49 can hardly have a different meaning from the same word where it is used in R. 48, it would, if it is binding upon us, be decisive of this case in favour of the petitioners.

[10] It is with the greatest respect and hesitation that I venture to distinguish the present case and to dissent from the width and scope of the meaning of the word "decree" in R. 49, Agency Rules, suggested by Meredith J. in 23 Pat. 442.[6] Upon a careful review, however, of the provisions and what appears to me to be the obvious intention of the Agency Rules, I feel bound to do so.

[11] It is to be remarked, in the first place, that Meredith J. in order to do justice and to justify the decision in that case, felt himself bound to attach the ordinary dictionary meaning of the word "decree" to that word as used in R. 49 or R. 54, Agency Rules. In my respectful opinion that was not necessary. The order there under consideration was an order of the Agency Subordinate Judge, Jeypore, refusing an application to rehear an appeal which had been decreed *ex parte*. It is important to note that the appeal was from an original decree in a suit brought for the possession of certain land in the Court of the Agency Munsif and that the decision of the Agency Munsif was clearly a decree within the definition contained in S. 2 (2), Civil P. C. The application to rehear the appeal was made under R. 54, Agency Rules, which provides:

"The agent to the Governor or the Government Agent, as the case may be, may, for sufficient cause, review his own judgment or order. He may, for sufficient cause, on the application of any party to a suit decided by any subordinate Court, direct review of its judgment or order. He may further empower any subordinate Court to review its judgments or orders for sufficient cause. Provided that no review shall be admissible under this rule in any case in which an appeal has been preferred and no application for review shall be disposed of without notice to the parties concerned."

[12] This rule is of much wider scope than the corresponding provisions as to review in the Civil Procedure Code and a refusal to review thereunder is, in my respectful opinion, unquestionably a decree within the definition of that term contained in S. 2 (2), Civil P. C. The Court so refusing is a Court of Review and so far as regards that Court the order of refusal conclusively determines the rights of the parties with regard to all the matters in controversy in the suit. Such an order of refusal is, for this purpose, equivalent to an order summarily dismissing an appeal under O. 41, R. 11, which has been held to be a decree: 30 C. W. N. 334.[7] No doubt, an order rejecting an application for review under O. 47, R. 1, Civil P. C., is not appealable, but this is because of the express provision to that effect contained in O. 47, R. 7 Civil P. C. That being so, I think that it was unnecessary to justify the decision in 23 Pat. 442[6] by reference to any dictionary meaning of the word 'decree.'

[13] The question remains what meaning should be attached to the term "decree" in Rr. 48 and 49 of the Agency Rules. Before passing to a consideration of the Agency Rules as a whole, I would note the provisions of R. 54 as above set out and of R. 55 which provides as follows:

"55. The Agent to the Governor or the Government Agent, as the case may be, for the purpose of satisfying himself that a decree or order made in any case decided by a Court subordinate to him was according to law, may call for the case and pass such order with respect thereto as he thinks fit."

[14] The use in R. 54 of the expression "judgment or order" and in R. 55 of the expression "decree or order" is in sharp contrast to the expression "decree" used in Rr. 48 and 49. I do not think that any distinction is to be made between the expression "judgment or order" in R. 54 and the expression "decree or order" in R. 55. The use of the word "judgment" in R. 54

is strong evidence that when the Governor in Council passed the Agency Rules he had in mind the provisions of the Civil Procedure Code since we find that the word "judgment" in the context of R. 54 of the Agency Rules has obviously been taken from O. 47, R. 1, Civil P. C., and was clearly not intended to imply any distinction between the word "judgment" in R. 54 and the word "decree" in R. 55. This is apparent from the wording of O. 47, R. 1, Civil P. C, which, for this purpose, may be summarised as follows:

"Any person considering himself aggrieved (a) by a decree or order . . . . . and who . . . . desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

[15] It is obvious that addition of the words "or order" following the word "judgment" in R. 54 and the word "decree" in R. 55 is quite inconsistent with an interpretation of the word "decree" in Rr. 48 and 49 which would extend that meaning to "any order from one having authority". Mr. B. N. Das attempted to explain the use of the word "order" in Rr. 54 and 55 of the Agency Rules by reference to the definition of the term "decree" in the Interpretation Clause at the beginning of the Agency Rules, which provides as follows: "Decree" shall include orders passed under Rr. 39 (1) and 43 (3) but not orders under Rr. 33 and 35 and he submitted that the word "order" was intended to cover the case of these orders under Rr. 33 and 35 which would otherwise have been excepted from the operation of Rr. 54 and 55. There is some *prima facie* point in this argument, but I do not think that it can possibly prevail. As we shall see, the Agency Rules contain a simplified and complete Code of Civil Procedure and the distinction in Rr. 54 and 55 thereof between the terms 'judgment' and 'order' and the terms 'decree' and 'order' correspond to a general and well recognised legal distinction which is made not only in the Indian Civil Procedure Code but in practically all Codes and Rules of Civil Procedure and reflects the business necessity for a difference in treatment of decrees and orders for the purposes of their finality and of appeals thereform and revisions thereof. The use of the term 'order' in Rr. 54 and 55 of the Agency Rules is *prima facie* completely general in scope and I can see no ground whatever for restricting the meaning of the term as there used to anything less than its usual ordinary and well recognised meaning or for supposing that the Governor in Council had not in mind the business necessity above referred in restricting further proceedings against an order to the review and revision provided for in Rr. 54 and 55 and the final possibility of revision under R. 59 of the Agency Rules. It follows that in using the expression "judgment or order" in R. 54 and the expression "decree or order" in R. 55 the Governor in Council must, in my opinion, have had in mind some such distinction between those terms as is contained in the Civil Procedure Code which was in force everywhere in British India except in the Agency Tracts, and the inference is that by the term "decree" the Governor in Council intended something corresponding generally to the definition of that term contained in the first sentence of S. 2 (2), Civil P. C., namely:

"decree means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

As to the remaining part of that definition, it is not necessary for the purposes of this case to decide whether the term would also extend to the other three specific matters included in that definition by S. 2 (2), Civil P. C., namely, rejection of plaint, the determination of question under S. 47 or S. 144. The fact that the definition in the Civil Procedure Code goes on to exclude any adjudication from which an appeal lies as an appeal from an order, or an order of dismissal for default, does not, in my view, affect the scope of the term "decree" as used in Rr. 48 and 49, Agency Rules. The exclusion of these matters from the scope of the term "decree" in the Civil Procedure Code is based solely upon the existence of other express provisions of the Code which deal specifically with those matters and therefore made it necessary for the purposes of that Code, to exclude them from the scope of the term "decree."

[16] The above inference from the wording of Rr. 54 and 55, Agency Rules as to the meaning of the expression "decree" in Rr. 48 and 49 thereof, is, in my opinion, strongly supported when we consider the scope and intent of the Agency Rules as a whole. These Rules are expressed to be made by the Governor in Council for the administration of the Agency tracts and for the regulation of the procedure of the officers appointed to administer them. They are divided into three parts under the headings 'Powers' which are dealt with under R. 1, 'Civil Justice' which is dealt with under Rr. 2 to 60 and 'Revenue' which is dealt with under Rr. 61 to 63. It is obvious that the bulk of the rules, therefore, is concerned with civil justice. Rule 2 deals with the valuation of suits, Rr. 3 to 10 with jurisdiction of Courts, Rr. 11 to 13 with transfer of suits, Rr. 14 to 28 with institution, trial and determination of suits, Rr. 29 to 38 with the execution of decrees and orders. The term "order" in this context is referable to R. 37 which deals with

the order for the execution of a decree passed by a Court in British India situated outside the Agency tracts, and therefore has no relevance for our purpose. Rules 39 to 41 deal with the investigation of claims and objections to execution, Rr. 42 to 44 deal with interim protection of properties, Rr. 45 to 46 cover special proceedings, Rr. 47 to 56 provide for appeals and Rr. 57 to 60 contain general provisions. It will thus be seen that Rr. 2 to 60 of the Agency Rules constitute in effect a simplified Civil Procedure Code and reference to the individual rules shows quite clearly and as one would expect that simplicity and avoidance of complicated and lengthy litigations are the objects for which the Agency tracts are governed by the Agency Rules rather than by the Civil Procedure Code. As we have seen, R. 48 provides for a second appeal to the High Court from an original decree passed by any Court subordinate to the Government Agent or the Agent to the Governor and R. 49 provides for a first appeal to the High Court from every original decree passed by the Agent to the Governor or the Government Agent. Rule 54, as we have also seen, provides a very extensive power to the Agent to the Governor or the Government Agent to review his own judgment or order, and R. 55 provides a power of revision of every decree or order made in a case decided by a Court subordinate to the Agent to the Governor or the Government Agent which is very much wider in scope than the corresponding provisions of S. 115, Civil P. C. As a final provision, intended, in my opinion, to cover cases where difficult matters of law arise or the proceedings of the Agent to the Governor or the Government Agent present unusual features, R. 59 confers a power of revision upon the High Court in cases where a petition against such proceedings is referred to the Court by the Governor. In my opinion, the scope and intention of Rr. 48, 49, 54, 55 and 59, Agency Rules, are perfectly clear and I can find no room for construing the word 'decree' in Rr. 48 and 49 as possessing any wider meaning than it does in the opening sentence of the definition in S. 2 (2), Civil P. C. All orders other than decrees are subjected by the rules to a very full power of revision. Under R. 55 the Agent to the Governor or the Government Agent possesses a very wide power of revising any order made by a Court subordinate to him. Under R. 54 the Agent to the Governor or the Government Agent possesses a very wide power of reviewing any order of his own. It is to be remembered that whilst the words "for any other sufficient reason" which appear in O. 47, R. 1, Civil P. C., are necessarily to be construed *ejusdem generis* with the previous specific reasons for review therein set out, there is no similar reason for cutting down the ordinary meaning of the words "or sufficient cause" in R. 54, Agency Rules, which on their plain and ordinary meaning cover, in my opinion, any case which in the interests of justice make a review desirable. Finally, as I have already pointed out, there is the safety value of R. 59 under which petitions against the proceedings of the Agent to the Governor or the Government Agent may be referred to the High Court if after submission to the Government they think fit so to refer. These three Rules 54, 55 and 59 in the context of a set of rules designed to achieve simplicity and avoid lengthy and complicated litigation, appear to me to be quite inconsistent with any intention on the part of the Governor in Council to make any order other than a decree within the meaning of S. 2 (2), Civil P. C., appealable under Rr. 48 and 49, Agency Rules.

[17] For the above reasons I am of opinion that the word "decree" where it appears in the Agency Rules means the formal expression of an adjudication which so far as the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit and may be either preliminary or final. Whilst there is no specific provision in the Agency Rules for a preliminary decree there is nothing therein to exclude the passing of a preliminary decree in a proper case and where such a decree is passed, it would, I think, come within the scope of the term "decree" in the above mentioned rules. The order of remand here in question is, in my opinion, clearly not a decree, since it does not purport to dispose of any of the matters in controversy in the suit, and in this respect I agree with the decision of their Lordships of the Madras High Court in 36 I. C. 801,[1] above referred to.

[18] I would, therefore, dismiss this application with costs. The hearing fee is assessed at three gold mohurs.

**Beevor J.**—I agree.

D.H. *Application dismissed.*

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**A. I. R. (35) 1948 Patna 71** *[C. N. 26.]*

BEEVOR J.

*Kanhu Charan Ramanuj Das and another — Petitioners* v. *Mangaraj Padhan and another — Opposite Party.*

Civil Revn. No. 136 of 1945, Decided on 24-2-1947, from order of Senior Deputy Collector, Balasore, D/- 1-6-1945.

**Orissa Tenancy Act (2 [II] of 1913), S. 31-B, Explanation and S. 228—Sale of holding in execution of rent decree — Subsequent sale of portion of holding in execution of money decree — Right of subsequent auction purchaser to apply for setting aside prior sale—Civil P. C. (1908), O. 21, R. 89.**

**On 14th April 1944 a certain holding was sold in execution of a rent decree. By that time the judgment-**

debtor having died his son had been brought on the record as his legal representative. On 15th April 1944 a portion of the holding was sold in execution of a money decree against the son and the sale was confirmed on 29th June 1944. The purchaser at such sale, meanwhile on 11th May 1944, made the requisite deposit and applied to have the sale under the rent-decree set aside :

*Held* that (1) by virtue of S. 65, Civil P. C , the purchaser must be treated as a transferee on 11th May 1944. [Para 9]

(2) The purchaser had a right under the Explanation to S. 31-B, Orissa Tenancy Act, to be brought on record as a judgment-debtor. [Para 10]

(3) Hence the purchaser could make the necessary deposit under O. 21, R. 89, Civil P. C., or under S. 228, Orissa Tenancy Act. [Para 10]

*P. C. Chatterji* — for Petitioners.

*B. N. Das and H. P. Bhagat* — for Opposite Party.

**Order.** — This is an application in revision against an order of the Senior Deputy Collector, Balasore, with appellate powers bringing on record a certain man under the provisions of S. 31-B, Orissa Tenancy Act, and directing that his application to deposit money to set aside the sale be disposed of according to law. This order reverses an order of the Rent Suit Officer of Balasore dated 21st December 1944, who held that the said person as an applicant had no right to make deposit under O. 21, R. 89, Civil P. C.

[2] The material facts are as follows: In 1940 a suit was brought to recover rent and on 27th September 1940 an *ex parte* decree for the sum of about Rs. 12 was passed in that suit. On 14th April 1944, the entire holding was brought to sale. By that time the judgment-debtor had died and his son was brought on the record as his representative. On 15th April 1944, opposite party No. 1 purchased 52 acres out of a holding in execution of a money decree against the son of the original judgment-debtor in the Court of the Munsif. On 11th May 1944 opposite party No. 1 deposited the requisite sums in the Court of the Rent Suit Officer who set aside the sale under O. 21, R. 89, Civil P. C. His right to make that deposit was challenged.

[3] In the application to set aside the sale it was not specified under what provision of law he was claiming to set aside the sale. The Rent Suit Officer considered both O. 21, R. 89 and S. 31-B, Orissa Tenancy Act, and held that the opposite party No. 1 had no right to make a deposit to set aside the sale. On appeal the Deputy Collector with appellate powers held that opposite party No. 1 had the right to be brought on the record as judgment-debtor under S. 31-B, Orissa Tenancy Act, and passed order accordingly.

[4] Two points have been urged on behalf of the petitioners. First, that no appeal lay to the Collector who transferred (? Sic) to the Deputy Collector with appellate powers, and secondly, that S. 31-B, Orissa Tenancy Act, was not applicable to the facts of the case.

[5] Mr. P. C. Chatterji appearing for the petitioners frankly conceded that the point regarding maintainability of the appeal to the Collector was not taken in the lower Court. At present I am of the opinion that the contention that the appeal did not lay to the Collector is invalid. But as this point was not taken in the lower Court and the facts have not been fully investigated, I do not wish to give a final decision on this point. One reason for this is that even if no appeal lies to the Collector, I have come to the conclusion that the decision of the Deputy Collector who heard the appeal was correct in law and there would be sufficient ground for interfering with the original order of the Rent Suit Officer. The crux of the question before me is whether the opposite party No. 1 had a right under the explanation to S. 31-B, Orissa Tenancy Act, to be brought on the record to make a deposit to set aside the sale either under O. 21, R. 89, Civil P. C., or S. 228, Orissa Tenancy Act.

[6] Section 31-B, Orissa Tenancy Act, runs as follows :

"(1) Notwithstanding anything contained in this Act, any transferee, who obtained a transfer of an occupancy holding or a portion or a share thereof, before the commencement of the Orissa Tenancy (Amendment) Act 1938, shall be liable to pay the fees lawfully payable by him at the time of the transfer, within three years from the coming into force of that Act or the date of the landlord's knowledge of the transfer whichever is later, but he shall not be liable to ejectment on the ground that the landlord has not given consent to the transfer.

(2) The holding or a portion or a share thereof shall not be liable to be sold in satisfaction of the decree for arrears of rent without making the said transferee a party to the proceedings in execution of the decree provided that the transferee has given notice of transfer by registered post to the landlord.

*Explanation* : Notwithstanding anything contained in this Act or in the Code of Civil Procedure in the case of a transfer of a holding or a portion or a share thereof, whether before or after the decree the transferee may be brought on record in the proceedings in execution either in substitution of or in addition to the judgment-debtor, and such transferee shall, when so added or substituted, be treated as a judgment-debtor for all purposes of the said proceedings in execution of the decree."

[7] Sub-section (1) refers only to transfers which took place before the commencement of the Orissa Tenancy Amendment Act, 1938. The words 'the said transferee' in sub-s. (2) must refer to transferee in sub-s. (1), that is, a transferee prior to the commencement of the Amendment Act. It would be natural to expect that the explanation to that section would be confined to such transfers, but the words 'whether before or after the decree' in the explanation seem to me to render such construction of the explanation itself im-

possible and the explanation must in my opinion be considered as referring to transfers before or after the decree, whether these transfers occurred before or after the Orissa Tenancy Amendment Act, 1938, came into force. In other words it is necessary to construe this explanation as if it were an independent section of the Act.

[8] Mr. P. C. Chatterji has urged that the explanation should be read as restricted to such transfers as took place before sale in execution of the decree but I can find no justification for reading into the explanation any such restriction; and it seems to me that the explanation must apply to all transfers which occurred before the execution is completed.

[9] It was also urged that on the date of his application, 11th May 1944, opposite party No. 1 was not really a transferee, because the auction sale in his favour in the Munsif's Court had not then been confirmed. But under S. 65, Civil P. C., where immovable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. The sale in favour of opposite party No. 1 was confirmed on 29th June 1944 and therefore under S. 65 the property purchased by him must be deemed to have vested in him from date of his purchase, that is, 15th April 1944. Thus he must be treated as a transferee of the property on 11th May 1944, the date of his application.

[10] I therefore agree that he had a right under the explanation to S. 31-B to be brought on record as a judgment-debtor and therefore he could make the necessary deposit under O. 21, R. 89 or S. 228, Orissa Tenancy Act. This petition therefore fails and is dismissed with costs. Hearing fee one gold mohur.

D.H. *Petition dismissed.*

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**A. I. R. (35) 1948 Patna 73** *[C. N. 27.]*

BEEVOR J.

*Kamij Shaikh — Appellant* v. *Emperor.*

Criminal Appeal No. 299 of 1946, Decided on 14-11-1946, from decision of Magistrate, 1st Class, Dumka, D/- 18-4-1946.

**(a) Penal Code (1860), S. 366A — Evidence of girl — Corroboration.**

It cannot be said that the evidence of the girl always needs corroboration in cases under S. 366A, but where it is found that the girl in question has been definitely lying on important points in her story, then it is unsafe to rely on other parts of her evidence to convict any person of a criminal offence unless that evidence is corroborated on material points. The presence of the girl in the house of the accused is not a material point for the purpose of corroboration. [Para 4]

**(b) Evidence — Appreciation — Unreliable witness — Corroboration.**

It is useless to speculate on possibilities or probabilities. There are varieties of possibilities, and in the absence of reliable evidence it is wrong to take the view that one possibility is more probable than another and treat that probability as corroboration of a witness who has been found clearly unreliable. [Para 4]

*S. R. Ghosal* — for Appellant.

*Y. Yunus* — for the Crown.

**Judgment.** — The appellant has been convicted by a 1st class Magistrate invested with powers under S. 30, Criminal P. C. under S. 366A, Penal Code, and has been sentenced to five years' rigorous imprisonment.

[2] The girl in question, one Samiran Bibi, was found at night at the house of the appellant which is in the same village as her husband's house. She had been missing from her husband's house for some days according to the prosecution story, and the prosecution was started on the basis of her story which was that she was induced to go to the appellant's house by threats, the appellant escorting her with a hasua. She also alleged that she was promised jewellery and comfort when she would be sent to Burdwan for another marriage. She also alleged that during her stay in the appellant's house she was raped by the appellant more than once.

[3] The learned Magistrate gave very good reasons in his judgment for disbelieving the story that the girl went to the appellant's house as the result of threats as alleged by her, but he accepted her story that she had been taken there by the appellant. He summed up his findings on this point in the following sentence: "In other words the complainant's story that she had been taken there by Kamij (the appellant) must be accepted corroborated as it is by the unassailable fact of her being recovered from his house." This finding followed another finding that the appellant's story that she had been planted in his house was untrue.

[4] In my opinion the learned Magistrate rightly recognised the need for corroboration of the evidence of the girl in this case. I am far from holding that the evidence of the girl always needs corroboration in cases under S. 366A, but where it is found that the girl in question has been definitely lying on important points in her story, then it is unsafe to rely on other parts of her evidence to convict any person of a criminal offence unless that evidence is corroborated on material points. Now I cannot agree with the learned Magistrate that the presence of the girl in the house of the appellant was a material point for the purpose of corroboration in this case. When once the story of threats had been disbelieved, the question which remained for decision was did the girl go to the appellant's house of her own accord or under inducement, and if she went by inducement, was that induce-

ment given by the appellant. Now on neither of these points would the presence of the girl in the house indicate in any way which way the question should be answered. It is consistent with either answer to the question. It is useless to speculate on possibilities or probabilities. To my mind there are varieties of possibilities, and in the absence of reliable evidence it is wrong to take the view that one possibility is more probable than another and treat that probability as corroboration of a witness who has been found clearly unreliable. I can find no other circumstances in the evidence to corroborate the girl's story that she went to the house of the appellant as a result of inducement by him and I must, therefore, hold that the charge under S. 366A, Penal Code, has not been proved against the appellant.

[5] This appeal is, therefore, allowed. The conviction and sentence are set aside and the appellant is discharged from his bail.

N.S. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 74** *[C. N. 28.]*

AGARWALA AG. C. J.

*Kamalesh Bhaduri—Petitioner* v. *Emperor.*

Criminal Revn. No. 905 of 1946, Decided on 14-10-1946.

**Criminal P. C. (1898), S. 480 — Sub-Judge starting proceedings against pleader for contempt — Evidence recorded — Sub-Judge, however, not intending to proceed under S. 480 or S. 482 but intending evidence to form part of his report to Disrict Judge for proceedings under Legal Practitioners Act—Procedure held was inappropriate and evidence recorded could not be foundation for order regarding contempt.**

Where the Subordinate Judge started proceedings against a pleader by serving a notice on him to show cause why he should not be committed for contempt (S. 228, Penal Code) and examined a number of witnesses, but he had no intention of proceeding either under Ss. 480 and 482 or under S. 476 but intended the evidence to form part of his report to the District Judge for the purpose of the proceedings under the Legal Practitioners Act which he had invited the District Judge to initiate:

*Held* that the Subordinate Judge did not adopt the procedure appropriate for dealing with a case of contempt and, therefore, the record that he made of the evidence could not be the foundation for an order against the accused in relation to the alleged contempt of Court, but only, if at all, for the purposes of the proceedings under the Legal Practitioners Act. [Para 2]

*Held* further, that there was no occasion to quash the proceedings started by the Judge. [Para 2]

Annotation :—('46-Com.) Cr. P. C., S. 480, Notes 1 and 10; S. 482, N. 1.

*S. C. Chakraverty* — for Petitioner.

*Gopal Prasad* — for the Crown.

**Order.**—This application arises out of a somewhat unfortunate proceeding in the Court of Mr. U. N. Singh, Subordinate Judge, on 5-6-1946. It appears that during the hearing of the civil suit on the morning of that day the lawyers for the plaintiff and the Court were in disagreement about various matters which it is unnecessary to detail, and about which I do not propose to express any opinion as there is also a proceeding under the Legal Practitioners Act pending against the pleaders concerned. Eventually, after the Court had risen for the day, a notice was served on one of the pleaders for the plaintiff, namely, the present petitioner Babu Kamalesh Bhaduri, calling upon him to show cause why he should not be proceeded against for contempt of Court and for disobeying an order of the Court. The petitioner showed cause, and the Subordinate Judge proceeded to examine a number of witnesses. As the incident or incidents which led the Judge to take this action were all matters which occurred in the presence of the Court, it is difficult to understand why it was necessary to waste so much public time in recording the statements of witnesses. However, that is what the Court did, and on 21st June, the petitioner applied for an adjournment, with the result that the next hearing of the matter was fixed for 16th July. In the meanwhile, the petitioner moved this Court to quash the proceedings. The procedure adopted by the Court is somewhat unusual. In the case of acts amounting to an offence under S. 228, Penal Code, S. 480, Criminal P. C., empowers the Court concerned to detain the offender in custody and at any time before the rising of the Court on the same day to take cognizanceof the offender and sentence him to pay a fine not exceeding Rs. 200. If the Court considers that such a fine is inadequate in the circumstances of the case, S. 482 authorises the Court to record the facts and the statement of the offender, and forward the case to a Magistrate having jurisdiction to try the same. That is the normal procedure in the case of a contempt of Court committed in the presence of the Court.

[2] Section 228, Penal Code, however, is one of the offences mentioned in cl. (b) of sub-s. (1) of S. 195 of the Code, and is, therefore, an offence to which S. 476 applies. Section 476 empowers the Court, in which or in relation to the proceedings of which an offence mentioned in cls. (b) and (c) of sub-s. (1) of S. 195 has been committed, to make a preliminary enquiry if it considers this to be desirable, and thereafter to make a complaint in writing and to forward the complaint to a Magistrate of the first class having jurisdiction. In forwarding the record to this Court the Subordinate Judge sent what he calls a report, in the course of which he said that he did not think it expedient himself to deal with Babu Kamalesh Bhaduri by starting proceedings under S. 480, Criminal P. C., and punishing him

under S. 228, Penal Code, but that he thought it more proper to start the present proceedings against him with a view to reporting his conduct to the District Judge and the High Court for taking proper action against him. Although, therefore, the learned Judge started by serving a notice on the petitioner to show cause why he should not be committed for contempt, he, according to his own report, had no intention of proceeding in either of the ways contemplated by the Code for dealing with a contempt committed in the presence of the Court as he himself says he did not think it a case in which he should proceed under S. 480, and it follows that S. 482 was also inapplicable. Obviously the Subordinate Judge had no intention of proceeding under S. 476 for, if that had been his intention, he must have contemplated making a complaint to a Magistrate of the first class, but, as he himself says, his intention was to make a report to the District Judge or to the High Court. It was not in his contemplation to make a complaint to a Magistrate of the first class. The only view that I can take of his proceedings in recording evidence is that he intended this evidence to form a part of his report to the District Judge for the purpose of the proceedings under the Legal Practitioners Act which he has invited the District Judge to initiate. There is, therefore, no occasion to quash the proceedings, and the only observation which is necessary to make is that, as the learned Judge has not adopted the procedure appropriate for dealing with a case of a contempt, the record that he has made of the evidence cannot be the foundation for an order against the accused in relation to the alleged contempt of Court, but only, if at all, for the purposes of the proceedings under the Legal Practitioners Act. Subject to these observations the rule is discharged.

V.R. *Rule discharged.*

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**A. I. R. (35) 1948 Patna 75** *[C. N. 29.]*

REUBEN J.

*Siram Mahto and others — Petitioners* v. *Emperor.*

Criminal Revn. No. 802 of 1946, Decided on 17-10-1946, against Order of Appellate Magistrate, Darbhanga, D/- 30-4-1946.

**(a) Estates Partition Act (Beng. Act 5 [V] of 1897), Chap. VI—No presumption of correctness attaches to entry made in Collectorate partition proceedings — The entry is admissible as piece of evidedce: 63 I. C. 194 (Pat.), *Disting.*** [Paras 4, 5]

**(b) Estates Partition Act (Beng. Act 5 [V] of 1897), S. 99 — The section merely lays down what the rights of encumbrancers will be—It does not operate automatically to dispossess the encumbrancer in possession if the encumbrancer does not voluntarily give up his possession.** [Para 7]

*Cases referred:*—

1. ('21) 63 I. C. 194 (Pat.), Debi Lal Sah v. Ram Bibeki Singh.
2. ('31) 12 P. L. T. 332 : 17 A. I. R. 1930 Pat. 376 : 126 I. C. 905, Lachhandhari v. Rajpat Mahton.
3. ('21) 63 I C. 226 : 8 A. I. R. 1921 Pat. 275, Jagdeo Narain Singh v. Bulaki Gope.
4. ('41) 22 P. L. T. 765 : 28 A. I. R. 1941 Pat. 613 : 198 I. C. 68, Kailash Singh v. Emperor.

*S. N. Banerji* — for Petitioners.

*Rajkishore Prasad* — for the Crown.

**Reuben J.**—The petitioners have been convicted under Ss. 147 and 379, Penal Code, and sentenced under the latter section to a fine of Rs. 25 each and, in default of payment of fine, rigorous imprisonment for ten days. No separate sentence has been imposed under S. 147.

[2] The prosecution case, which has been accepted by the Courts below, is that on 13-9-1945 at village Bhagwatpur in the jurisdiction of police station Samastipur the petitioners accompanied by ten or fifteen other persons cut and dishonestly removed from Plot No. 3685 makai crop grown on behalf of Makardhwaj Narain Singh and his cosharers, and that on protest by the complainant (P. W. 1), the petitioners threatened to beat P. W. 1 and ran to do so. The defence was a denial of the occurrence and an assertion that the land in question is in the cultivating possession of petitioners Siram Mahto and Keshwar Mahto.

[3] Plot No. 3685 was formerly included in Tauzi No. 3871 and in the khatian (Ex. 1) prepared in the year 1898 it is recorded as the bakasht land of one Thuksharan Lal, with a note that it is in the possession of Shyam Bihari Lall as a usufructuary mortgagee. Following this entry, there was a Collectorate partition of the estate, and in the partition proceedings Plot No. 3685 was allotted to one of the new tauzis formed in the partition and numbered Tauzi No. 14148. This tauzi fell in the share of one Parmanand Lall, whose successors-in-interest are Ramnarain (D. W. 1) to the extent of 8 annas and his cousin Chariter to the extent of the remaining 8 annas. Thuksaran Lall aforesaid got a separate patti. In the barwarda (Ex. E) prepared in the partition proceedings, Plot No. 3685 is recorded as bakasht without any note of the possession of the mortgagee. The complainant's masters, Makardhwaj and his cosharers, claim possession of Plot No. 3685 as successors-in-interest of the original mortgagee Shyam Behari Lall, their case being that the mortgage is still unredeemed. Siram Mahto and Keshwar Mahto claim possession of the land under an oral thika from Ram Narain (D. W. 1) of Ram Narain's 8 annas share, and a kebala (Ex. D) and a bharna deed (Ex. C) both executed in November 1943 by Awadesh, successor-in-interest of Charitar, and covering the

8 annas share of Chariter. The Courts below found possession in favour of the prosecution relying on the khatian of 1898 and the oral evidence of possession adduced by the prosecution.

[4] The first point urged before me is that the Courts below have not given proper weight to the entry in the barwarda (EX. E), according to which the plot in question is the bakasht of the landlords and which does not show the possession of the mortgagee. In this connexion my attention has been drawn to the case in 63 I. C. 194[1] as an authority that a presumption attaches to the record prepared in a Collectorate partition proceedings. That was a case in which the record was prepared in accordance with an application filed by the proprietors, who were parties to the proceeding, admitting a certain mokarrari grant. As was pointed out in the later case in 12 P. L. T. 332,[2] that was a special case in which the admission made by the proprietors gave weight to the record prepared but ordinarily no presumption of correctness attaches to this record such as attaches to a record-of-rights prepared under the provisions of the Bihar Tenancy Act. In this connexion a reference may also be made to the case in 63 I. C. 226.[3]

[5] Undoubtedly, the entry in the barwards is admissible as a piece of evidence. It has to be considered, however, along with the other evidence, which in this case consisted of the khatian of 1898, and the oral evidence adduced on both sides. The provisions regarding the preparation of the record of existing rights and assets in Collectorate partition proceedings are contained in Chap. 6, Estates Partition Act (Bengal Act 5 [v] of 1897). The Deputy Collector making the partition may make an independent survey and prepare the record-of-rights and assets under SS. 45 to 48 of the Act, which involves, among other things, a general notification after the preliminary preparation of the record, and attestation of the record in the presence of the persons interested and attending, a correction of the record upon objections made by persons interested after such local enquiry as may be thought fit, a check of the correctness of the measurement if its correctness is challenged, and finally publication of the record as eventually prepared and a grant of copies to landlords and tenants. Otherwise, under S. 49 of the Act, the Deputy Collector may accept the papers of a previous survey of record-of-rights, etc. "after making any correction which may appear necessary." There is nothing on the record of the present case to show under which of these differing provisions the barwarda in question was prepared and hence it is not clear what weight would attach to the record so prepared.

[6] What the petitioners particularly rely on in the barwarda is the fact that it does not show the land as being in the possession of the mortgagee. The suggestion appears to have been made before the Courts below that this shows that the mortgage was redeemed. As has been pointed out, however, by the original Court, no evidence to this effect was adduced on behalf of the defence while, on the contrary, the case of the prosecution definitely is that the mortgage was not redeemed. Treating the entry in the barwarda merely as a piece of evidence, I find it impossible to hold that the Courts below erred in holding that the entry in the khatian together with the oral evidence of the prosecution witnesses must prevail over the entry in the barwarda.

[7] Next, it is contended that under the provisions of S. 99, Estates Partition Act, the mortgage charge must be held to have been transferred to the share allotted to the mortgagor Thuksaran. This section merely lays down what the rights of encumbrancers will be. It would not operate automatically to dispossess the encumbrancer if the encumbrancer does not voluntarily give up his possession. In a case under S. 379, Penal Code, we are concerned primarily with possession and the Courts have rightly considered this point. They have found that in fact Makardhwaj and his cosharers are in possession. The question, therefore, as to whether the right of Makardhwaj and his cosharers to possession was affected by the partition proceedings of 1902 is irrelevant in the present case.

[8] Thirdly, it is urged that the Courts below have erred in treating Makardhwaj as a tenant. The reference is to the appellate Court's judgment in which the appellate Court speaks of the complainant's master as being the "recorded tenant." It is obvious that the word "tenant" has been loosely and incorrectly used. The Court was dealing at this part of the judgment with the question as to whether the khatian should prevail over the batwara record or not, and the question about the exact status of the predecessors-in-interest of Makardhwaj and his cosharers was of no importance. The mistake, therefore, has not affected the correctness of the finding.

[9] Next it has been urged that there is no finding as to who grew the crop. A perusal of the record shows that all the prosecution witnesses on the point of possession speak of the crop in question having been grown by the complainant on behalf of Makardhwaj. The evidence of these witnesses has been accepted by the Courts below without any reservation. We may, therefore, take it that the statements about who grew the crop have also been accepted by them.

[10] It has been urged that the accused were not given an opportunity to produce a certain

register to show that tobacco was grown on the land by them. The application for calling for this register was filed on 28-1-1946 and was dealt with on 30-1-1946 as follows :

"Defence file a petition to call for certain papers from Excise (Central) Office. It is too late. Defence got ample opportunity to call their witnesses and documents. A rejoinder is also filed by prosecution. The petition is rejected."

The order-sheet of the Magistrate shows that the prosecution closed their case on 22-12-1945 and the case was adjourned to 25-1-1946 for defence. On 25-1-1946 two defence witnesses were examined and cross-examined and the defence filed a petition asking for the summoning of one more witness which was allowed and the case was adjourned to 28-1-1946 for further evidence and argument. Apparently, on further consideration the defence did not want to examine even that witness, because the record shows that this witness was not examined on 30th January when the defence closed its case and arguments were heard. The defence having already been given so much time for producing its evidence, I cannot say that the trial Court erred in refusing to call for the register in question.

[11] Next, it is urged that the evidence in this case being of a general nature and the cases of the specific accused persons not having been separately considered, the conviction under S. 379 against the petitioners cannot stand. In support of this contention I am referred to the case in 22 P. L. T. 765.[4] There were several accused persons in that case, and the convictions were under Ss. 147 and 379. The nature of the evidence in the case does not appear from the report. The defence of two of the accused persons was that they were entitled to cut the crop and had done so a few days before the date of the occurrence as alleged by the prosecution. The other accused persons stated that they had been falsely implicated because they happened to be boundary witnesses. In these circumstances, Varma J. held that the conviction under S. 379 was correct so far as the two accused persons were concerned, but that the other accused persons should get the benefit of the doubt. In the present case the accused persons themselves have made out no definite case at all. They refused to make any statement under S. 342 and the written statement filed on their behalf merely denies the truth of the prosecution story. There is, however, a distinct statement by one of the defence witnesses that all the accused persons got the maize cut in their presence. The evidence of the prosecution witnesses is general to the effect that the seven accused persons, together with the other ten to fifteen persons who were not before the Court, cut the makai crop. There was no cross-examination as to the details of the occurrence and this general statement does not appear to have been challenged. In these circumstances, there seems to be no reason to interfere with the conviction of the accused persons.

[12] Finally, the question of the severity of the sentences has been raised. Considering the circumstances of the case, I do not think that the sentences are unduly severe.

[13] I would, therefore, dismiss this petition.

G.B. *Petition dismissed.*

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**A. I. R. (35) 1948 Patna 77** *[C. N. 30.]*

VARMA J.

*Bibi Soghra — Petitioner* v. *Emperor.*

Criminal Revn. No. 1128 of 1945, Decided on 23-10-1945 from order of Sub-divisional Officer, Nawadah, D/- 15-11-1944.

(a) Criminal P. C. (1898), S. 145 — Amendment of proceedings—Addition of parties.

Where proceedings under S. 145, Criminal P. C, are pending for several years after the attachment of the property in dispute and considerable changes have taken place in the constitution of the parties, the Court is, on an application by a party, entitled to amend the previous proceeding in view of the new circumstances and there is nothing illegal in it. [Para 2]

Annotation : ('46-Com.) Cr. P. C., S. 145, N. 20.

(b) Criminal P. C. (1898), Ss. 145 (3) and 537— Proceedings under S. 145 — Inquiry started before return of service to certain parties — No prejudice caused to parties—Proceedings not bad. [Para 5]

Annotation : ('46-Com.) Cr. P. C., S. 145, N. 28, pt. 3.

*M. Rahman and Anwar Ahmad*—for Petitioner.

*Sarjoo Prasad and Rai Pares Nath* — for the Crown.

**Varma J.** — The second party in a proceeding under S. 145, Criminal P. C., are the petitioners before this Court. The dispute was with regard to four Plots Nos. 432, 566, 474 and 1094 of Khata No. 277 in village Sarkanda within the jurisdiction of Govindpur police station in the district of Gaya.

[2] The trial Court declared possession in favour of the first party who happen to be tenants. The second party, petitioners before this Court are the landlords. After going through various pieces of evidence adduced in the case the Court below came to the conclusion that the possession of the first party was established. This order was passed as early as 15-11-1944. The petitioners, however, moved this Court on 15-8-1945 and obtained a rule. The most important point that has been urged by Mr. Rahman is on the question of procedure. A proceeding under S. 145 was initiated on the report of a second class Magistrate on 3-7-1940 and the subject-matter of the dispute was attached, but curiously enough no step seems to have been taken to inquire into the question of possession by the Magistrate till 11-5-1944 when Nago put in an

application before the learned Magistrate when another proceeding was drawn up. If I have understood Mr. Rahman's argument aright, his argument is that when a previous proceeding under S. 145 was pending, the Magistrate had no jurisdiction to initiate a second proceeding under S. 145 with regard to the same subject-matter in dispute. But this argument is not maintainable if one considers the contents of the petition filed by Nago and the first order in the order-sheet on that petition. The very opening paragraph of Nago's petition says "that the aforesaid case is pending for disposal since the last several years and in this period there have been considerable changes in the members of the first party and so it is essential that a fresh proceeding should be started making the persons named below party in this case" and the prayer of Nago is "that Your Honour would be graciously pleased to start a fresh proceeding after amalgamating the former two proceedings into one and further be pleased to order for issue of proceedings in the names of the following persons" etc. This petition was evidently put up before the Magistrate on 12-5-1944 when he passed the following order :

"Perused the petition for action under S. 145, Criminal P. C. There is apprehension of breach of the peace. Draw up proceedings under S. 145, Criminal P. C., and serve on the parties. The lands are under attachment. The parties to file their documents and written statements on 29-5-44."

So from the quotations that I have given both Nago as well as the Magistrate were conscious of the fact that proceedings under S. 145 were pending, but that certain changes had taken place in the constitution of the first party as it then was and therefore it was necessary to issue fresh proceedings. The original first party, I may mention, was later on relegated to the position of second party in the new proceedings. I think the real grievance must be of the party which was deprived of his possession by the attachment in 1940, but I see no illegality in the proceeding which was drawn up on 12-5-1944. The Court was entitled to amend the proceedings in view of new circumstances and there is nothing illegal in this.

[3] The next point that was urged was that the enquiring Magistrate should not have relied upon the local inspection that he held and if he relied upon it at all, he should have referred to the important facts mentioned in his report. This inquiry was held under S. 148, Criminal P. C., which mentions the purpose for which such inquiries are to be held. The learned Magistrate has prepared an inspection note and he has mentioned all the material facts both for and against each party.

[4] At one stage Mr. Rahman thought that certain matters in favour of his clients were not mentioned in the judgment, but later on it was pointed out to him that they were mentioned and considered by the learned Magistrate.

[5] Then there was another argument to the effect that the case was decided in contravention of the provisions of sub-s. (3) of S. 145, that is to say, that before the service returns were received by the Court with regard to certain individuals, the inquiry proceeded; but the learned Sessions Judge aptly pointed out that these were instances in which either those individuals had accepted the contention of Nago or had granted receipts to Nago. No prejudice can be said to have been caused to those individuals.

[6] The next argument was that if the property was under attachment from the year 1940, then possession could not have been declared in favour of Nago inasmuch as Nago could not be said to be in possession within two months of the date of the initiation of the next proceeding. But this argument assumes that the proceeding which was drawn up under the order passed on 12-5-1944 was a new proceeding altogether which it could not be in view of the fact that the attachment was recognised by that order.

[7] All the points urged having failed the rule is discharged.

D.R./V.W. *Rule discharged.*

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**A. I. R. (35) 1948 Patna 78** *[C. N. 31.]*

AGARWALA J.

*Jagmohan Lal and others — Petitioners* v. *Emperor.*

Criminal Revn. No. 1440 of 1945, Decided on 21-1-1946, from order of Addl. Sessions Judge, Saran, D/- 30-7-1945.

**(a) Cotton Cloth and Yarn (Control) Order (1943), R. 12 (1)—Offence under—Sanction for prosecution of that offence must be obtained—Sanction for prosecution for charge under R. 12 (4) or framing of charge under R. 8 of Bihar Cloth and Yarn Dealers Licensing and Control Order, 1944, will not validate conviction for offence under R. 12 (1) : 32 A. I. R. 1945 Pat. 375, *Rel. on* ; 32 A. I. R. 1945 Pat. 477, *Ref.* [Paras 2 & 4]**

**(b) Cotton Cloth and Yarn (Control) Order (1943), R. 12 (1) — Maximum price fixed, but not published according to R. 10 — No offence. [Para 3]**

*Cases referred*: —

1. ('45) 24 Pat. 257 : 32 A. I. R. 1945 Pat. 375 : 221 I. C. 426, Kapildeo v. Emperor.
2. ('45) 24 Pat. 487 : 32 A. I. R. 1945 Pat. 477, Manohar Lall v. Emperor.

*Rajkishore Prasad* — for Petitioners.

*K. D. De* — for the Crown.

**Order.** — Petitioner Jagmohan Lal has been sentenced to pay a fine of Rs. 1000, and in default to undergo rigorous imprisonment for six months on conviction of an offence under R. 81 (4), Defence of India Rules. Petitioner Bishwanath

Prasad has been sentenced to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months for a similar offence. The other two petitioners have been sentenced to pay a fine of Rs. 300 or to undergo rigorous imprisonment for six months on the same charge.

[2] On 14-10-1944, a test purchase was made at the shop of Ganga Company of which Jagmohan Lal is the manager. The purchase consisted of three lengths of coating for which the purchaser was charged Rs. 94-4-0 a cash memo. being given to him for Rs. 88-13-0. The receipt was written by the petitioner Madho Prasad, a munib of the shop. The petitioner Bishwanath was the salesman. This fact having been reported to the Sub-divisional Officer of Chapra, sanction for the prosecution of the accused was obtained from the Provincial Government. The sanction stated that the prosecution of the petitioners was sanctioned under cl. (23), Cotton Cloth and Yarn (Control) Order, 1943, on a charge under R. 12, Cl. (4) of that Order. Clause 4 of R. 12 of the Order is as follows:

"No manufacturer or dealer shall, without sufficient cause, refuse to sell cloth or yarn to any person."

Two charges were framed against the accused, one under Cl. (4) of R. 12, Control Order, 1943, and the other under Cl. (8), Bihar Cloth and Yarn Dealers Licensing and Control Order, 1944. The latter is as follows:

"No licensee shall sell or offer to sell any cloth or yarn at a price in excess of the maximum price fixed for it . . . ."

It was pointed out in 24 Pat. 257[1] that a prosecution for selling cloth or yarn at a rate above the controlled price requires sanction of the Provincial Government or of an officer of the Provincial Government duly authorised in that behalf under R. 3 of the Order of 1943 and the necessity of such a sanction could not be avoided by framing a charge under R. 8 of the Order of 1944 as that rule does not create a punishable offence at all. This view was re-agitated in 24 Pat. 487.[2] The present petitioners were also convicted of an offence under Cl. (8) of the Order of 1944, but no separate sentence was passed on them. In view of the decisions cited above, this conviction must be set aside.

[3] With regard to the convictions in respect of an offence under R. 12 (4) of the Order of 1943, it is not the prosecution case that the petitioners refused to sell cloth or yarn and no evidence in that behalf was led. The case of the prosecution is that they sold cloth at a rate in excess of the controlled price fixed by the Textile Commissioner in exercise of the powers conferred upon him by R. 10 of the Order, which is an offence under Cl. (1) of R. 12 of the Order. As there was no evidence on the record that the price fixed by the Textile Commissioner for cloth of the kind which is the subject-matter of the present case had been fixed, the hearing of this application was adjourned in order to enable the Crown to satisfy the Court that the Textile Commissioner had in fact fixed the price less than that charged by the petitioners. It now transpires that although a maximum price was fixed for the cloth in question, this price had not been notified in the Gazette of India as required by R. 10 of the Order. As the Order requires such publication, it cannot be considered an offence to sell above the price fixed by the Commissioner until he has notified the price which he has fixed by means of a notification in the Gazette of India.

[4] Furthermore, the prosecution of the petitioners for an offence under Cl. (1) of R 12 has not been sanctioned, as the sanction which was obtained in this case was the sanction for an offence under Cl. (4) of R. 12. The conviction and sentences of the petitioners are, therefore, set aside. The fines, if paid, will be refunded.

D.R./D.H. *Conviction set aside.*

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**A. I. R. (35) 1948 Patna 79** *[C. N. 32.]*

DAS AND DALZIEL JJ.

*Emperor* v. *Ramadhar Kurmi*—*Accused.*

Jury Ref. No. 6 of 1946, Decided on 11-12-1946, Reference made by Asst. Sessions Judge, Shahabad, D/- 29-7-1946.

(a) Criminal P. C. (1898), S. 297 — Misdirection — Placing of inadmissible evidence before jury amounts to misdirection — That object of doing so was to point out discrepancies in complainant's evidence is immaterial. [Para 4]

Annotation :— ('46-Com.) Cr. P. C., S. 297, N. 11, Pts. 21, 22, 23.

(b) Criminal P. C. (1898), S. 298— Matters of fact —Jury are sole judges of facts and are not bound by opinion expressed by Judge in charge. [Para 4]

Annotation:— ('46-Com.) Cr. P. C., S. 298, N. 9, Pts. 1, 7.

(c) Criminal P. C. (1898), S. 301 — Verdict of jury is deemed to be that of jury as body — In case of disagreement between jurors their individual opinions should not be disclosed : 12 A. I. R. 1925 Oudh 746, *Rel. on.* [Para 10]

Annotation:—('46-Com.) Cr. P. C., S. 301, Pts. 1, 5.

(d) Criminal P. C. (1898), S 297 — Non-direction — Accused charged with kidnapping girl under S. 366, Penal Code—Failure of Judge to warn jury of danger of convicting upon uncorroborated testimony of girl and to explain what amounts to corroboration in such cases amounts to serious non-direction : 26 A. I. R. 1939 Pat. 536, *Rel. on.* (Per *Das J.*) [Para 12]

Annotation:— ('46-Com.) Cr. P. C., S. 297, N. 9, Pt. 61; N. 12, Pt. 27.

(e) Criminal P. C. (1898), S. 307 — High Court's powers on reference—Power to dispose of case finally without remand—High Court finding wrong admission of evidence by Judge and consequent

misdirection of jury by placing such evidence before it — High Court must consider evidence itself — After excluding inadmissible evidence remaining evidence not sufficient to justify conviction—High Court can order acquittal—Retrial need not be ordered : 22 A. I. R. 1935 Cal. 184 (F.B.) and 21 A. I. R. 1934 Cal. 847, *Rel. on.* [Para 6]

Per *Das, J.*— Section 167, Evidence Act and S. 537, Criminal P. C., do not in terms apply to a reference under S. 307, Criminal P. C., but the principles embodied therein can be applied : 33 A. I. R. 1946 P. C. 82, *Rel. on*; 33 A. I. R. 1946 P. C. 151, *Ref.* [Paras 13, 14, 15]

Annotation :— ('46 Com.) Cr. P. C., S. 307, N. 11, 14.

*Cases referred* :—

1. ('35) 22 A. I. R. 1935 Cal. 184 : 62 Cal. 572 : 155 I. C. 687 (F.B.), Rafiquddin Ahmad v. Emperor.
2. ('34) 21 A. I. R. 1934 Cal. 847 : 62 Cal. 337 : 153 I. C. 454, Ilu v. Emperor.
3. ('25) 26 Cr. L. J. 1346 : 12 A.I.R. 1925 Oudh 746 : 89 I. C. 386, Jagannath v. Emperor.
4. ('46) 33 A. I. R. 1946 P. C. 151 : 25 Pat. 601 : 73 I. A. 174 : 226 I. C. 148 (P. C.), Ramanugrah Singh v. Emperor.
5. ('39) 26 A. I. R. 1939 Pat. 536 : 18 Pat. 698 : 184 I. C. 354, Sachinder Rai v. Emperor.
6. ('46) 33 A. I. R. 1946 P. C. 82 : I. L. R. (1946) Lah. 119 : 73 I. A. 77:224 I. C. 426 (P.C.), Abdul Rahim v. Emperor.

*Ramanand Sinha (Amicus curiæ)*—for Reference.

*Tarkeshwar Nath* — against Reference.

**Dalziel J.**—This is a reference under S. 307, Criminal P. C., from the learned Assistant Sessions Judge of Shahabad in respect of the accused person Ramadhar Kurmi who was charged under S. 366, Penal Code, in a trial held with a jury of five, who by a majority of four to one gave a verdict of guilty. The learned Assistant Sessions Judge holding that the verdict is perverse and wholly unwarranted by the evidence on record has referred the case with a recommendation that the accused should be acquitted.

[2] The complainant is one Agin Singh, a Rajput of village Masarh in P. S. Arrah Mufassil, and the case relates to the alleged kidnapping of his two daughters, Rajkalia and Gorki, for the purpose of compelling them to marry against their will. Rajkalia was found by the lady doctor of Arrah (P. W. 3) to be aged between 12 and 13, and Gorki to be aged between 11 and 12. The prosecution case is that on the evening of 16th June 1945, at about 9 P. M., Agin Singh having left his house for about half an hour, in his absence the accused Ramadhar Kurmi, who used to fetch water to the house of Agin Singh, came and took away Rajkalia and Gorki on the pretext that their *nani*, who lives in village Galimapur in another district, had sent for them. They were taken first to the house of one Sahodri Ahirin in their own village and then to the house of the accused himself where they remained for that night. Next morning they were taken via Arrah town to a village Bingawan Rampur, and from there the accused is said to have taken them to the bank of the river Sone, where one Birbahadur Singh was waiting with a mare. Birbahadur Singh took the girls on the back of the mare to Hardi Chapra, the accused accompanying them, and at Hardi Chapra Birbahadur sold Rajkalia to one Ramdeyal Singh for Rs. 400 and the girl was married in the house of Ramdeyal to the latter's son Bikram Singh. This ends the story of the girl Rajkalia, until she was recovered from the house of Ramdeyal Singh by the police on 27th July. Gorki had further adventures. She ran away from the house of Ramdeyal Singh, and went back to Bingawan Rampur, where she went to the house of Ganga Singh and Mahadeo Singh. From there she was taken by Mahadeo to village Dehuli, and was kept in the house of Dome Hajam for about 15 days, and thereafter she was taken by Mahadeo's grandson, Sheokumar Singh, to the house of Jagdish Ahir in village Jhakar. There Gorki told Jagdish Ahir who she was and how she had been deceitfully taken from her home. Jagdish then made her over to some Banias who took her to Masaurhi bazar, where they left her. She went to the house of Sheonandan Gope, Dafadar of village Masaurhi, and from there she was ultimately recovered by the police on 24th August. Agin Singh had already, after making search and obtaining some clues, lodged his first information at the Arrah Mufassil thana on 17th July.

[3] There are two main grounds on which the learned Assistant Sessions Judge disagrees with the verdict of guilty, *viz.* (1) that the prosecution story is inherently so improbable as to be unworthy of belief, and (2) that the evidence, particularly of Agin Singh, is so discrepant and contradictory as to be unacceptable.

[4] On the hearing of this reference it came to our notice that a great deal of evidence, which was pure hearsay, was entirely inadmissible, had been put on record in the trial Court and placed before the jury. Much of the evidence in this case relates to the enquiry which Agin Singh made in various quarters to discover the whereabouts of his daughters. He is said to have obtained information from a number of persons, some of whose names are given, although here, as the learned Assistant Sessions Judge points out, there are marked discrepancies as to who these people were. None of them was called as witness. Statements alleged to have been made by these persons to Agin Singh and others and also statements of unknown persons have been very freely admitted on to the record. One of the most glaring examples will serve to show the nature of this evidence. In his examination-

in-chief Agin Singh is recorded as having deposed as follows:

"There (Bingawan Rampur) we learn that Ramadhar and Sahodri had kept my daughters in the house of Sahodari's daughter and I further learnt that from that house Ramadhar had taken my two daughters to the bank of the river Sone. I also learnt that from the bank of the river, Birbahadur Singh had taken both the daughters on horse back to Hardi Chapra. Ramadhar had also gone with them; there in the house of Birbahadur Singh, my daughters were kept in a room. Then I learnt that Birbahadur and Ramadhar had sold my elder daughter Rajkalia for Rs. 400 to Ramdeyal Singh and Bikrama Singh . . . ."

Agin Singh is here quoting statements of persons whom he does not even name, and who have not appeared as witnesses. These statements, if believed, would afford strong corroboration of the evidence of the girls, Rajkalia and Gorki, themselves on which the whole case of the prosecution rests. In short, here and in many other passages the evidence of the girls was sought to be corroborated by other evidence which is pure hearsay, and is inadmissible. In his charge to the jury the learned Assistant Sessions Judge placed the evidence of this nature very prominently before the jury. It is true that he did so mainly for the purpose of pointing out discrepancies between one statement and another made by Agin at various times or between his statements and those of other witnesses, Jiut Singh and Raghunandan Singh, who are said to have accompanied him during his enquiries. This, however, does not appear to me to detract from the mischief of not only permitting the jury to hear such evinence (but also ?) bringing it prominently to their notice in the charge. As the learned Assistant Sessions Judge himself instructed the jury they were the sole judges of the facts and were not bound by any opinion which he himself expressed on them. It is quite likely that they were not so deeply impressed by the various discrepancies which he pointed out to them as by the volume of the evidence itself regarding the facts alleged to have been discovered by Agin Singh during his enquiries.

[5] I do not find much authority in previous rulings regarding the functions of the High Court on a reference under S. 307 when, apart from the question whether the verdict on the jury is unreasonable or perverse, it is further found that a certain amount of inadmissible evidence has been placed before the jury. A.I.R. 1935 Cal. 184[1] is a case which is somewhat to the point. There on a reference under S. 307 against a verdict of guilty the Court found that the manner of presentation of evidence by the prosecution had been somewhat improper, and on this point arising it was considered what order should be passed. It was remarked that a retrial should not be ordered where it can be established that there is really no evidence to go before a jury because to order a retrial in such circumstances would be to put the accused to unnecessary harassment. The danger of the prosecution in retrial trying to fill up gaps in the evidence was also pointed out. Actually in that case a retrial was ordered, but this does not affect the aptitude of the above-quoted remarks. In A. I. R. 1934 Cal. 847[2] which was not actually a case which came up to the High Court on a reference under S. 307 but on appeal, but where the question was raised whether the Sessions Judge should have made a reference under S. 307, it was held that on a question of misdirection as to evidence this Court has to see whether it is reasonably probable that the jury would not have returned the verdict but for the misdirection complained of.

[6] In the present case it appears to me that we have wrong admission of evidence and consequent misdirection of the jury by placing such evidence before it. Under S. 307 the High Court is to consider all the evidence but it goes without saying that it is only admissible evidence that can properly be considered. If after excluding the inadmissible evidence the remaining evidence is such that the jury would probably not have given the verdict of guilty, or that, if they had it would have been an entirely unreasonable verdict, the proper order for this Court to pass is one of acquittal. That indeed appears to be position here. I very much doubt whether the jury would have returned the verdict of guilty if their minds had not been influenced by all the hearsay evidence they were allowed to hear. If they had, I would have had no hesitation in holding that their verdict left on the record as against the accused will be that of the two girls themselves. There is some evidence about the alleged wanderings of Gorki after she had run away from Hardi Chapra, i. e., her going back to Bingawan Rampur and then to Dehuli, Jhakar and finally Masaurhi, but apart from the fact that this evidence is somewhat discrepant and unconvincing, it relates to a stage after the accused Ramadhar Kurmi had ceased to have any hand in the matter, even according to the prosecution allegations.

[7] The charge against the accused is one of kidnapping the girls from the lawful guardianship of their father, and rests on the allegation that he took them away from the house in village Masarh on the evening of 16th June without the consent of Agin Singh. On this we have only the evidence of the girls themselves. Corroboration would have been provided by evidence to support the the story of their being taken to Bingawan Rampur and then Hardi Chapra where Rajkalia is said to have been sold

and married. But as I have said, all the evidence of this is pure hearsay, and no competent witness on the point has been examined, except one Charitar Singh (P. W. 10) who throws over the prosecution case by deposing that it was the complainant by whom the girl Rajkalia was sold to Ramdeyal Singh. Further as the learned Assistant Sessions Judge has remarked in his grounds of reference, the entire story of the girls being taken away is a most unlikely one. They are said to have gone off quite happily with the accused, who is nothing to them except that he apparently used to fetch water to their house, on the pretext that he was going to take them to their *nanihal*, and they made no attempt to suggest that their father should be consulted in the matter. They are said to have spent the first night in the village itself, but still made no attempt to get a touch with their father. Indeed, there is an admission in the evidence of Agin himself that he went to the house of the accused that night which, if true, would destroy the prosecution case. Even after it must have become apparent that the pretext of taking them to the *nanihal* was false, the girls seem to have made no protest, and gone with the accused quite willingly.

[8] It certainly seems much more likely that the girls should have left the house originally with the consent of their father. The defence case was that he himself had sold them for marriage. As against this it might be urged that there is clear evidence of the complainant having gone to search for his daughters which indicates that he must have lost trace of them, but it is quite possible that after he had sent them away willingly, owing to some hitch or breakdown in the negotiations they were then removed out of his reach and kept away from him.

[9] As regards the discrepancies which the learned Assistant Sessions Judge has found in the evidence, these relate mainly to the enquiries made by the complainant along with the witnesses Jiut Singh and Raghunandan Singh. The two main discrepancies appear to me to be the following. First there is a story introduced in Court that the complainant, on getting some information that his daughters had gone to Rampur at first went to a village of that name in Muzaffarpur district under the wrong impression that this village was meant, and that then after he had come back to Masarh he discovered that the real village was Bingawan Rampur in Arrah District. There was no mention of this in the First Information Report and it was possibly introduced for the purpose of explaining the long delay in lodging the first information. Secondly, there is a serious discrepancy as to whether or not the complainant with Jiut Singh and Raghunandan Singh only went to Bingawan Rampur in the course of their enquiries or pursued them further up to Hardi Chapra. In the first information Agin Singh not only did not mention any visit to Hardi Chapra, but after speaking of what he had learnt in Bingawan Rampur he definitely states that he did not go to Ramdeyal Singh's place. Before the committing Magistrate neither Agin Singh himself nor the two witnesses said anything about their having gone to Hardi Chapra. In examination-in-chief in the Sessions Court also Agin Singh himself again does not mention that he went to Hardi Chapra, but after describing his enquiries in Bingawan Rampur he says that thereafter he lodged the complaint at the thana. The other two witnesses, however, deposed that they all went to Hardi Chapra. In cross-examination Agin Singh was asked about this point and then he says that he went on from Bingawan Rampur to Hardi Chapra. The question was then put: "Where did you stay in Hardi Chapra?" and it is recorded that the witness gave his answer after a long time saying that "we stayed under a tree at night." There are also numerous discrepancies and contradictions regarding the enquiries alleged to have been made at Hardi Chapra, and even as to whether they went to the house of Ramdeyal Singh, and whether they saw him. In cross-examination Agin Singh says that at Hardi Chapra he met Ramdeyal Singh who told him that he had taken one of his daughters from Birbahadur for Rs. 400 for marrying her with his son Bikram Singh, although, curiously enough, this very important incident was never mentioned at any previous stage of the case, Jiut Singh says that they went to the *duar* of Ramdeyal Singh, but out of fear did not say anything. Raghunandan Singh does not even mention their going to the house of Ramdeyal Singh. It is quite clear that there has been suppression of the truth here, and it is over a most important point in the case, viz., the contract between the complainant and Ramdeyal Singh. The defence case is that Agin Singh himself sold his elder daughter to Ramdeyal Singh. Thus, when we find that Agin Singh is obviously concealing facts about his visit to the house of Ramdeyal Singh at Hardi Chapra, this leads to a very obvious inference against the prosecution case.

[10] I, therefore, find that this reference has to be accepted, although not solely for the reasons given by the learned Assistant Sessions Judge. One further remark has to be made. It appears that when the foreman of the jury was asked for the verdict he stated not only the numbers of those jurors who held the accused guilty, or not guilty, but actually gave the names of those

who held either opinion. This is entirely improper in a jury trial where the verdict is deemed to be that of the jury as a body, (either unanimous or of a majority), and the individual opinions of the jurors are not intended to be disclosed. In 26 Cr. L. J 1346[3] when a similar thing was done it was held to "opposed to a fundamental principle of the scheme of trial by jury."

[11] I would accordingly accept the reference, and disagreeing with the verdict of the jury acquit the accused Ramadhar.

[12] **Das J.** — I agree to the order proposed by my learned brother. In view of the importance of the question raised, I should like to express in my own words the reasons for my opinion.

[13] The question raised is what is the duty of the High Court on a reference under S. 307, Criminal P. C., when it is found that there has been misreception of evidence, or serious misdirection or non-direction by the Judge. If there had been no such defect, the principles laid down by their Lordships of the Judicial Committee in A. I. R. 1946 P. C. 151[4] would have applied and the main question would have been if upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury. Even on that basis, I would have been prepared in this case to say that the majority verdict of the jury was unreasonable. Accused Ramadhar Kurmi was charged in the case with kidnapping the two girls, Rajkalia and Gorki with intent that they might be compelled to marry against their will. Except the evidence of the two girls, there was no other direct evidence on the point that Ramadhar had taken them from the lawful guardianship of their father. One of the girls, Rajkalia, had admitted in cross-examination—it should be remembered both are very young and liable to be influenced by others—that she and her sister had been asked by her father and others to say that Ramadhar had taken them from their house and to make statements in a particular way. This clearly shows tutoring of the girls; and though it is pre-eminently a matter for the jury to believe a witness or not, I find it extremely difficult to hold that a reasonable body of men could have come to the conclusion at which the majority of the jurors arrived, on the basis of evidence which was clearly tutored and otherwise unnatural as well as improbable, as pointed out by the learned Sessions Judge.

[14] I now turn to the main question raised. There is no doubt that a lot of hearsay evidence has been admitted in this case, and placed before the jury for consideration. The learned Judge had clearly misdirected the jury in asking them to consider as evidence that which was not evidence at all — though he did so for the purpose of pointing out certain contradictions. The jury were probably misled by the volume of such hearsay evidence to think that it afforded corroboration to the testimony of the girls, though it did nothing of the kind. Then, the learned Judge has been guilty of a serious non-direction. He has failed to warn the jury of the danger of convicting upon the uncorroborated testimony of the girls, and has also failed to explain what amounts to corroboration in such cases. The duty of a Judge in such cases has been very clearly explained in A. I. R. 1939 Pat. 536.[5] The learned Judge has completely failed in his duty in this respect.

[15] When there has been such serious misdirection and non-direction, the verdict of the jury is clearly vitiated. What then is the duty of the High Court—must it send back the case for retrial or can it decide it for itself? The question has been considered in somewhat similar circumstances by their Lordships of the Judicial Committee in a recent decision: A. I. R. 1946 P. C. 82.[6] I must say at once that their Lordships were not dealing with a reference under S. 307, Criminal P. C. The case came to their Lordships from a reference under S. 374, Criminal P. C., and an appeal by the convicted person, which were dealt with by a Divisional Bench of the Lahore High Court after certain questions had been referred to the Full Bench. The answers given by the Full Bench were limited to a murder reference and an appeal under S. 449, Criminal P. C. Their Lordships, however, did not so limit their decision, but dealt generally with the powers of the appellate Court with reference to a jury verdict where (a) there has been misreception of evidence; or (b) a serious misdirection. Dealing with the effect of misreception of evidence, their Lordships observed:

> "The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict."

[16] Their Lordships have referred in this connection to S. 167, Evidence Act, which says that the improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. It may be argued that S. 167 will not in terms apply in the case of a reference under S. 307, Criminal P. C., because sub-s. (2) of the latter section requires the Judge to submit the case without recording a judgment of acquittal or conviction, and, therefore, there is no decision to reverse or justify. I do not how-

ever, see why the principle underlying the section should not apply, particularly when sub-s. (3) of the same section says that in dealing with the case so submitted, the High Court may exercise any of the powers it may exercise on an appeal. Dealing with the question of misdirection or non-direction, their Lordships say :

"That there has been a mis-direction is not of itself a sufficient ground to justify interference with the verdict The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has, in fact, occasioned a failure of justice. If the Court so finds, then it has a plain justification for interfering and indeed a duty to do so."

Their Lordships have considered the effect of S. 537, Criminal P. C., which says, amongst other things, that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under chap. 27, or on appeal or revision on account of any misdirection (in any charge to a jury unless such misdirection ?) has in fact occasioned a failure of justice. Here, again, it may be argued that S. 537 does not in terms apply to a reference under S. 307, Criminal P. C. Referring to the various ways in which a verdict of the jury may come before the High Court, their Lordships have referred to S. 307 and have said :

"Similarly, under S. 307 where the trial Judge who disagrees with the jury's verdict submits the case to the High Court it is plainly the duty of the High Court to go into the whole case for itself in order to enable it to decide whether the accused should be acquitted or convicted."

The generality of the observations made above would, no doubt, be subject to the principles laid down in A. I. R. 1946 P. C 151[4] where the verdict is not vitiated by any error. Where, however, there is misdirection, the principle embodied in S. 537 would apply and if the verdict is erroneous owing to the misdirection, it can have no weight on a reference under S 307 as on an appeal. In dealing with the case submitted under S. 307, it would then be the duty of the Court to go into the whole case in order to find out the effect of the misdirection, and if it has resulted in an erroneous verdict, to decide what order should be passed. It must interfere with the verdict, and as observed by their Lordships in A. I. R. 1946 P C 82[6] what form the interference will take will depend on the facts of each case : the Court may in an appropriate case order a re-trial or convict or acquit the accused person, as the case may require. I am, therefore, of the opinion that the principles laid down by their Lordships in A. I. R. 1946 P.C. 82[6] regarding the powers of the appellate Court as respects the verdict of the jury where there has been misreception of evidence or misdirection to the jury, would also apply, as far as possible, when a case is submitted to the High Court under S. 307, Criminal P. C., and the High Court finds that there has been misreception of evidence or misdirection by the Judge.

[17] In the case before us the misdirection has clearly resulted in an erroneous verdict : if the hearsay evidence is excluded, the only evidence which remains is the tutored evidence of the girls on which the accused cannot be convicted. This is not, therefore, a case where a re-trial should or ought to be ordered. The accused is clearly entitled to an acquittal.

G.N. *Reference accepted.*

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**A. I. R. (35) 1948 Patna 84** *[C. N. 33.]*

BEEVOR J.

*Baso Rai and another* — *Petitioners* v. *Emperor.*

Criminal Revn. No. 954 of 1946, Decided on 11-11-1946, from order of Addl. Sessions Judge, Dumka, D/- 18-6-1946.

**(a) Criminal P. C. (1898), S. 123 — Santhal Parganas Justice (Amendment) Regulation, 1940, whether affects S. 123.**

There is nothing in the Regulation which affects S. 123, Criminal P. C., and therefore, the final reference to the Sessions Judge in Santhal Parganas is valid. [Para 3]

**Annotation.—('46-Com.) Cr. P. C., S. 123 N 2.**

**(b) Criminal P. C. (1898), S. 123—Combined order of security and imprisonment in default—Validity.**

Where an order requires a person to furnish security and includes in the same order a direction that in default he should suffer rigorous imprisonment for two years the order directing that the person should suffer rigorous imprisonment is invalid; but that does not affect the order calling upon him to furnish security : 14 A. I. R. 1927 Mad. 976 and 23 A. I. R. 1936 Nag. 265, *Foll.* [Para 4]

**Annotation.—('46-Com.) Cr. P. C., S. 123 N. 3 Pts. 1 and 3.**

**(c) Criminal P. C. (1898), S. 118 — Omission to specify date by which security is to be furnished is repairable by subsequent order.**

A Magistrate in his original order failed to specify the date by which the security was to be furnished ; but, when this error was pointed out, he passed an order requiring the person to furnish security by a certain date :

*Held*, that as he had omitted to give any such direction in his original order he could repair that omission by his later order. [Para 5]

**Annotation.—('46-Com.) Cr. P. C., S. 118, Note 4.**

**(d) Evidence Act (1872), S. 60 — Reputation and hearsay—Evidence of person not knowing another but only hearing of his reputation is hearsay — Criminal P. C., S. 117.**

Evidence of those who know the person and his reputation is not hearsay and is admissible. But the evidence of those who do not know the person but have only heard of his reputation is hearsay and inadmissible : 20 A. I. R. 1933 Pat. 189, *Foll.* [Para 7]

**Annotation.—('46-Com.) Cr. P. C., S. 117 Note 7.**

*Cases referred* :—

1. ('28) 51 Mad. 178 : 14 A. I. R. 1927 Mad. 976 : 106 I. C. 218, In re Ibraya Rowthen.

2. ('36) 23 A. I. R. 1936 Nag. 265 : I. L. R. (1937) Nag. 173 : 167 I. C. 403, In re Rangi.
3. ('23) 3 P. L. T. 538 : 10 A. I. R. 1923 Pat. 104 : 65 I. C. 464, Jai Rao v. Emperor.
4. ('21) 25 C. W. N. 334 : 8 A. I. R. 1921 Cal. 625 : 61 I. C. 233, Jogendra Kumar v. Emperor.
5. ('33) 20 A. I. R. 1933 Pat. 189 : 143 I. C. 687, Firangi Rai v. Emperor.

*S. R. Ghosal* — for Petitioners.

*Syed Yasin Yunus* — for the Crown.

**Order.** — The two petitioners were ordered by the Sub-divisional Magistrate of Deoghar to furnish security on bonds of Rs. 500 each with two sureties each of Rs. 250 each to be of good behaviour for two years, and a reference under S. 123, Criminal P. C., has been rejected by the Additional Sessions Judge of the Santal Parganas.

[2] There has been an unfortunate error in the proceedings, because the learned Sub-divisional Magistrate first made a reference to the District Magistrate or the Additional District Magistrate of the Santal Parganas, and, when that officer held that he had no jurisdiction, the Sub-divisional Magistrate made a reference to the Additional Sessions Judge direct, and it was only when that officer returned the proceedings that he finally made a reference to the Sessions Judge, Bhagalpur, who subsequently transferred the reference to the Additional Sessions Judge of the Santal Parganas for disposal.

[3] The first point urged on behalf of the petitioners was that the reference did lie to the District Magistrate or the Additional District Magistrate. Reliance was placed on the Santal Parganas Justice (Amendment) Regulation, 1940, which provides that the Criminal P. C., 1898, shall have effect in the Santal Parganas subject to certain modifications specified therein. That Regulation certainly requires that appeals from convictions by 1st class Magistrate shall lie to the District Magistrate, and not to the Sessions Judge ; but I can find nothing in the Regulation which affects S. 123, Criminal P. C., and I, therefore, hold that the final reference was correctly made to the Sessions Judge, Bhagalpur, who is also Sessions Judge of the Santal Parganas.

[4] The next point taken is that the learned Sub-divisional Magistrate was wrong in passing an order requiring the petitioners to furnish security and including in the same order a direction that in default the petitioners should suffer rigorous imprisonment for two years. This certainly is incorrect, and, if authority is needed, reference may be made to the decisions in 51 Mad. 178[1] and A. I. R. 1936 Nag. 265.[2] It follows that the order of the Sub-divisional Magistrate contained in his original order, directing that the petitioners should suffer rigorous imprisonment, is invalid ; but, in my opinion, that does not affect his order calling upon them to furnish security.

[5] There was another error committed by the learned Magistrate in that he did not, in his original order, specify the date by which the security was to be furnished ; but, when this error had been pointed out by the Additional District Magistrate, he passed an order on 20-3-1946, requiring the petitioners to furnish security by 2-4-1946, and I consider that, as he had omitted to give any such direction in his original order, he could repair that omission by his later order dated 20-3-1946.

[6] Reference was then made to the question of joint trial of the petitioners. It was pointed out that in 3 P. L. T. 538[3] a Divisional Bench of this Court dissented from the decision of the Calcutta High Court in 25 C. W. N. 334.[4] The Calcutta case had taken the view that the question of joint trial depended entirely on allegations of the prosecution in cases under S. 110, Criminal P. C. The head-note suggests that this Court decided that legality of the trial depends on the facts subsequently found to be true. But, on considering the judgment, it seems to me clear that the case before this Court in 3 P. L. T. 538[3] was that there was no evidence of joint association which would justify the joint trial. In the present case, there certainly was evidence of joint association of the two petitioners, and in these circumstances I do not think the joint trial was illegal.

[7] It was further urged that the Courts had relied on hearsay evidence. But it seems that they have relied on evidence of reputation, and the distinction between evidence of reputation, and hearsay evidence was fully set out in the decision of Mohammad Noor J. in A. I. R. 1933 Pat. 189.[5]

[8] As regards the merits, it seems to me that the lower Courts have fairly considered the evidence, and I see no reason to interfere with their decision.

[9] I find, therefore, that the petitioners have rightly been required to give security. The Sessions Judge has reduced the period of security to one year and the amount of security to be furnished to a bond of Rs. 200 each with two sureties of the like amount each. The amount of security does not appear excessive, and this order of the Sessions Judge should, therefore, stand. In view, however, of the fact that the execution of the security bonds was stayed by order of this Court, I direct that the period of one year should run from the date when the petitioners surrender to their bail before the Sub-divisional Magistrate.

W.N.G. *Order accordingly.*

## A. I. R. (35) 1948 Patna 86 *[C. N. 34.]*

MANOHAR LALL AND MEREDITH JJ.

*Sheobadan and others — Appellants* v. *Bihari Sah and others — Respondents.*

Letters Patent Appeal No. 32 of 1944, Decided on 11-12-1946, from judgment of Varma J., D/- 12-10 1944.

**(a) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 [IX] of 1938), Ss. 3 and 4 — Defective application under S. 3 filed within time — Defect can be cured under S. 4 even after limitation fixed by S. 3 (3).**

Where an application under S. 3 is made within the period of one year from the date of coming into force of this section, as required by sub-cl. (3), but is defective inasmuch as all the landlords were not impleaded as contemplated by sub-cl. (2) the Collector has jurisdiction under S. 4 when the defect was brought to his notice either to allow the defect to be removed then and there or within time to be fixed by him. This can be done even after the period of one year referred to in sub-cl. (3) when in fact the original application was within time. [Para 10]

**(b) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9[IX] of 1938), S. 3 —Landlords forming joint Hindu family — Karta can represent them—Civil P. C. (1908), O. 1, R. 10.**

Where the landlords or the tenants in proceedings under S. 3 form a joint Hindu family they can effectively be represented by the Karta of the family and other members need not be impleaded : 33 All. 272 (P.C.), 1 A. I. R. 1914 P. C. 136, 14 A. I. R. 1927 P. C. 56 and 12 A. I. R. 1925 P. C. 272, *Rel. on.* [Paras 6 and 15]

Annotation :—('44-Com.) Civil P. C., O. 1, R. 10 Note 18, Pt. 3.

*Cases referred.—*

1. ('11) 38 I. A. 45 : 33 All. 272 : 9 I. C. 739 (P.C.), Kishen Parshad v. Har Narain Singh.
2. ('14 41 I. A. 216 : 1 A. I. R. 1914 P. C. 136 : 36 All. 383: 24 I. C. 504 (P.C.), Sheo Shankar Ram v. Mt. Jaddo Kunwar.
3. ('27) 54 I. A. 122 : 14 A. I. R. 1927 P. C. 56 : 51 Bom. 450 : 101 I.C. 44 (P.C.), Lingangowda v. Bastangowda.
4. ('25) 52 I. A. 398 : 12 A. I. R. 1925 P. C. 272 : 47 All. 883 : 28 O.C. 352 : 91 I. C. 370 (P.C.), Mata Prasad v. Nageshar Sahai.

*Tarkeshwar Nath* — for Appellants.
*K. Deyal and G. C. Bannerji* — for Respondents.

**Meredith J.** — This is an appeal under the Letters Patent from the decision of Varma J., (as he then was) sitting singly. The appellants are defendants 1 to 4. The suit was decreed by the Munsif, and the decision has been upheld in the first appeal and by the learned Judge of this Court in second appeal.

[2] The facts of the case may be very briefly stated. Plaintiffs 1 to 7 in the suit are the sixteen annas landlords of a village, Majhari. Defendants 1 to 4 were the old tenants of the holding, Khata No. 41, having occupancy rights. In 1932, plaintiffs 1 to 7 purchased the holding in execution of a rent decree against the tenants and subsequently obtained delivery of possession. They then settled the land with plaintiff 8.

[3] On 27th February 1939, defendant 1 filed a petition before the Rent Reduction Officer for restoration of the holding under S. 3, Bihar Act, 9 [IX] of 1938, (The Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act 1938). The application was by defendant 1 alone, and defendants 2 to 4 were never brought on record. Of the landlords, only plaintiff 1 was made a party. On 2nd March 1940, defendant 1 petitioned for making plaintiff 7 a party, and that was done then and there. Plaintiffs 2 to 6 were never made parties at all. By an order dated 9th May 1940, the Revenue Officer ordered restoration of the land to the defendant and he got possession accordingly.

[4] The suit was brought to have this order declared without jurisdiction, inasmuch as plaintiff 7 was not impleaded until after one year from the date when S. 3 of the Act came into force. Section 3, sub-s. (2) of the Act provides that the application shall contain *inter alia*, the name of the landlord of the holding by whom it was purchased, and sub-s. (3) provides that no application under this section shall be entertained unless it is made within a period of one year from the date on which this section comes into force.

[5] The grounds on which the Courts below have held that the order of the Revenue Officer was without jurisdiction are that plaintiff 7 was not brought on the record until more than one year after the section came into force. That would be 14th November 1939, whereas plaintiff 7 was not impleaded until 2nd March 1940; and the application must be deemed to have been made as against plaintiff 7 only at the time he was impleaded. This view, in my opinion, might be correct were it not for the provisions of S. 4 of the Act. Section 4 is in these terms:

"4. (1) When the Collector entertains an application made by a raiyat under S. 3, the Collector may, if such application does not comply with the requirements of sub-s. (2) of the said section. allow the defect to be remedied then and there or within a time to be fixed by him.

(2) If the defect is not remedied then and there or where the Collector has fixed a time under sub-s. (1) within such time the Collector shall reject the application."

It is perfectly clear from this section that the Collector has jurisdiction to entertain an application defective in not complying with the requirements of sub-s. (2) of S. 3. It was only because the present application did not fully comply with these particular requirements that it was defective. It seems to me to follow that the Revenue Officer had full jurisdiction to entertain the application, which was made before him in time though it was defective. Section 4 allows

the Collector to permit the defect to be remedied then and there or by such time as he may fix. If the Collector can allow a defective application to be made good, it seems to me that he must have jurisdiction to entertain a defective application. We are not concerned with any question of limitation, but with the narrow question whether the order made was without jurisdiction. What happened was that no one drew attention to the defect until 2nd March. The karpardaz of the landlords has previously appeared, and he did not point out any such defect. The Revenue Officer had directed the office to report if the application was defective. It does not appear that this defect was pointed out until defendant 1 himself asked for plaintiff 7 to be impleaded, and then the defect was remedied under S. 4. In my opinion, the Revenue Officer acted under S. 4, and, therefore, acted with jurisdiction.

[6] Mr. Kameshwar Deyal for the respondents has also tried to support the decision on two other grounds. He points out that plaintiffs 2 to 6 were never brought into the proceedings at all. But the finding is that plaintiffs 1 to 6 were all members of a joint family and were represented by plaintiff 1.

[7] Mr. Kameshwar Deyal further points out that defendants 2 to 4 were never brought into the proceedings. But there was a finding by the trial Court that defendants 1 to 4 were all members of a joint family and represented by defendant 1. No doubt this is the reason why these two points were not urged either in first appeal or second appeal.

[8] As it is clear that plaintiffs 2 to 6 and defendants 2 to 4, if they were not directly in the proceedings, were represented therein, it is unnecessary to consider the points of law urged by Mr. Kameshwar Deyal that an application under S. 3 must be made by all the tenants of the holding. In my opinion, this appeal must succeed, and I would accordingly allow it and dismiss the suit with costs throughout.

[9] **Manohar Lall J.**—I agree, and wish to make a few observations. The only point upon which the respondents succeeded in the Court below was that the application by the tenant which was filed under S. 3 of the Act was defective and that the defect was not removed within the period of one year from the date upon which S. 3 came into force. It was, therefore, argued successfully in the Courts below that the order of the Collector directing the restoration of the lands to the appellant was ultra vires. Mr. Kameshwar Deyal has also supported the reasoning which commended itself to the Courts below.

[10] In my opinion, upon a plain reading of Ss. 3 and 4 it is clear that this argument is without any substance. Section 3, sub-cl. (3) directs that no application under S. 3 shall be entertained unless it is made within the period of one year from the date on which this section comes into force. In the present case, the application was filed within the requisite period on behalf of the raiyat and in this he had impleaded certain persons whom he thought to be all the landlords of the holding. That application was admittedly defective in that it did not give the names of all the landlords including plaintiff 7 as contemplated by sub-cl. (2) to S. 3. But S. 4 clearly directs that when the Collector entertains an application made by a raiyat under S. 3 and he finds therein any defect in that it fails to comply with the requirements of sub-cl. (2) to S. 3, he may either allow the defect to be removed then and there or within the time to be fixed by him. In the present case, the Collector, when the matter was pointed out to him allowed the defect to be removed within the time fixed by him, and the defect was so removed. It is argued that the Collector had no right to allow the defect to be removed after the period of one year referred to in sub-cl. (3) to S. 3. I do not agree with this argument at all, as S. 4 can only come into force when there is a defect, and the defect can be allowed to be removed within a time fixed at the discretion of the Collector. Mr. Kameshwar Deyal indeed suggested that the application should not have been entertained at all because it was defective in limine. But S. 4 contemplates that the defects may be removed after the application is entertained. Indeed, the entertaining of the application has nothing to do with the defect in the application. An application if made by a raiyat and apparently in form and filed within the period of one year has to be entertained. For these reasons I must overrule the first argument raised by Mr. Kameshwar Deyal. It is needless to observe that the jurisdiction of the Collector to decide and entertain an application and to allow the defects to be removed if acting within the statute cannot be questioned by the civil Courts. The civil Courts are no doubt concerned to find out whether the Collector acted within his jurisdiction vested by the Act but here, all the Collector did was to act under S. 4, sub-cl. (1), and he allowed the defects to be removed.

[11] Mr. Kameshwar Deyal also tried to support the decision of the Court below upon the ground that plaintiffs 2 to 6 have not been made parties to the application by the raiyats. When it was pointed out to him that the finding of the trial Court were to the effect that plaintiffs 2 to 6 were represented by plaintiff 1 as the karta

he tried to argue that the doctrine of representation of the members of a joint Hindu family has not place in the Bihar Restoration Act. It is enough to refer to three cases of the Privy Council where the question of the representation of the members of a joint Hindu family by the karta has been considered.

[12] Lord Robson in delivering the judgment of the Board in 38 I. A. 45[1] examined a number of cases decided by the Indian High Courts where the decisions were not uniform and observed that those could only be supported on the ground that the plaintiff in those cases were shown or not shown to be karta of the family. He pointed out that it would be impossible to carry on the business of the joint Hindu family if the doctrine of co-ownership was to be applied. This is exactly what happened in the present case. Plaintiffs 1 to 6 were the undivided members of a Mitakshara Hindu family and were represented by the karta.

[13] The next case is the case in 41 I. A. 216[2] where their Lordships observed:

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."

[14] In 54 I. A. 122,[3] Lord Phillimore took the same view and made these observations at page 125:

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Expln. 6 of S. 11, Civil P. C., 1908, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors. In this case there is no question of majors. It seems clear that the plaintiff in the previous suit was acting on behalf of himself and his minor children to try to exclude a collateral branch from a share of the family property. If he had succeeded the judgment would have enured for the benefit of the children, and as he has failed, they must take the consequences. Their Lordships had to comment upon and apply this Expln. 6 in the case of 52 I. A. 398.[4]"

[15] Applying these principles to the facts of this case, it is clear on the finding of the trial Court that plaintiff 1 effectively represented plaintiffs 2 to 6 in the proceedings before the Collector. Similarly, defendant 1 effectively represented defendants 2 to 4 before the same officer. I have no doubt that it was on account of this very clear and precise finding of the trial Court that this question was not agitated any more either before the Subordinate Judge or before the learned Single Judge of this Court. In any case, even if it is assumed that plaintiffs 2 to 6 and defendants 2 to 4 were not effectively represented by plaintiff 1 and defendant 1 respectively, I am of opinion that this will not affect the jurisdiction of the Collector to pass an order of restoration. The defect should have been pointed out before him that he should not deal with the application in the absence to plaintiffs 2 to 6 and defendants 2 to 4. He had jurisdiction to order the restoration of an application which he entertained within the time fixed by the statute, and on which he passed an order after the defects had been removed.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 88** *[C. N. 35.]*

MANOHAR LALL AND MEREDITH JJ.

*Jagdeo Sahu — Plaintiff — Appellant* v. *Dwarka Prasad—Defendant—Respondent.*

Letters Patent Appeal No. 11 of 1945, Decided on 17-12-1946, from judgment of Shearer J., D/- 13-3-1945.

**(a) Tort — Malicious prosecution — Initiation of —Proceedings under S. 133, Criminal P. C.**

*A*, who was the Chairman of Local Union Committee received from rate-payers *B* and *C* a petition for the removal, to a secluded place, of the kerosene godowns belonging to one *K*, which were contiguous to the houses of the public and highly dangerous. *A* forwarded the petition to the Sub-divisional Magistrate for favourable orders with an endorsement that he had himself seen the spot and found that the keeping of kerosene godowns on the place alleged was highly objectionable and dangerous for the public and that must be removed. The Magistrate made a conditional order under S. 133, Criminal P. C. But the proceedings were dropped on *K* appearing in answer to the notice and satisfying the Magistrate that the allegations against him were unjustified. Thereupon *K* filed a suit for malicious prosecution against *A*, *B* and *C*:

*Held* that (1) the proceedings in the Court of the Sub-divisional Magistrate must be held to have been instituted by *A* and the fact that *A* did not himself originate the petition was immaterial as *A* completely associated himself with the petition and by his endorsement thereon made it his petition. The petition was a complaint of public nuisance and the proceedings under S. 133 were the natural consequence of the complaint made: 25 A. I. R. 1938 Pat. 529 and 30 All. 525 (P. C.), *Ref.* [Paras 6 and 7]

(2) It was a case of the Chairman of Local Union Committee making improper use of his official position and it could not therefore be held that *A* acted not in his personal capacity but officially as Chairman of the Committee; [Para 7]

(3) the suit for malicious prosecution would lie upon the complaint; [Para 8]

(4) *A*, in making the endorsement on the petition and forwarding it being actuated by malice and improper motive and not by any desire for the general welfare and there being no reasonable and probable cause for the institution of the proceeding and the plaintiff, as a result of the malicious proceedings, having suffered harassment and loss, the suit must be decreed. [Para 9]

**(b) Tort — Malicious prosecution — Malicious complaint under S. 133, Criminal P. C.**

It is not an actionable wrong to institute civil proceedings without reasonable and probable cause even if malice be proved, for in the contemplation of law de-

fendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour, which gives him his costs against the plaintiff. But there are proceedings which, though civil are not ordinary actions, and fall within the reason of the law which allows an action to lie for malicious prosecution. Proceedings of a quasi-criminal type fall within this class, because they are proceedings under the Criminal Procedure Code, in the Criminal Courts and there is no question of the person proceeded against being indemnified in costs. Hence suit for malicious prosecution would lie upon a malicious complaint of public nuisance under S. 133, Criminal P. C. : 18 I. C. 737 (Cal.) ; 2 A. I. R. 1915 Cal. 79 and (1883) 11 Q. B. D. 674, *Rel. on.*

[Paras 8 and 9]

*Cases referred* :—

1. ('38) 19 P. L. T. 889 : 25 A. I. R. 1938 Pat. 529 : 178 I. C. 619.
2. ('08) 30 All. 525 : 11 O. C. 371 : 35 I. A. 189 (P. C.).
3. ('13) 17 C. W. N. 554 : 18 I. C. 737.
4. ('15) 19 C. W. N. 935 : 2 A. I. R. 1915 Cal. 79 : 27 I. C. 449.
5. (1883) 11 Q. B. D. 674 : 52 L. J. Q. B. 488 : 49 L. T. 249 : 31 W. R. 668.

*A. N. Chatterji* — for Appellant.

*D. N. Varma* — for Respondent.

**Meredith J.**—This appeal under the Letters Patent from the decision of Shearer J. arises out of a suit for damages for malicious prosecution. The suit was brought by the local agent of the Burma Shell Co. at Dehri-on-Sone, against three defendants, of whom the first was the Chairman of Local Union Committee.

[2] On 1-3-1940, he forwarded to the Sub-divisional Magistrate Sasaram a petition which he had received from certain rate payers including defendants 2 and 3. In the petition it was stated that at the station Jagdeo Sahu, Babulal Kali Charan Sahu (Plaintiff's firm) had had got oil godowns at two places, and contiguous thereto were situated many houses of the public with tile and straw thatches and there was also a liquor shop by the side of the oil godowns. These were highly dangerous, and they requested that the oil godowns might be removed to a secluded place. Defendant 1 sent on the petition with the following endorsement :

"Forwarded to the S. D. O Sasaram, for favourable orders. I myself had been to the spot, and found that the keeping of kerosene godown on the place alleged is highly objectionable and dangerous for the public. It must be removed."

[3] On receipt of this, the Sub-divisional Magistrate made a conditional order under S. 133, Criminal P. C., requiring the plaintiff to show cause, or to remove the kerosene oil godown. The plaintiff in answer to the notice appeared, and satisfied the Magistrate that there was little or no danger of fire and that the allegations against him were unjustified. The proceedings were then dropped. Thereupon the present suit was instituted. At the trial evidence was adduced to show that the plaintiff was one of those who had made complaints against the manner in which defendant 1 had been discharging his duties as Chairman of the Union Committee. The Courts of fact came to the conclusion that defendant 1 in making the endorsement he did and forwarding it was actuated by malice, with improper motive, and not by any desire for the general welfare or the public good. They also found want of reasonable and probable cause for the institution of the proceedings, and held that the Chairman was responsible for their institution. In this view the plaintiff was given a decree against all three defendants, but only for a sum of Rs. 21-13-3, the expenses actually incurred by the plaintiff in showing cause against the notice. Only defendant 1 appealed, and his appeal was dismissed by the Subordinate Judge who heard it. Defendant 1 then came before Shearer J. in second appeal and that learned Judge has dismissed the suit with costs throughout as against defendant 1. Hence this Letters Patent appeal by the plaintiff.

[4] Shearer J. observed that in order to entitle the plaintiff to a decree it was incumbent on him to show that it was this defendant who had caused the proceedings against him to be instituted. The Courts below, he said, had not directed their minds to the question, and had assumed that as the learned Sub-divisional Magistrate would never have instituted the proceeding if the defendant had not sent in the petition or made the endorsement, the defendant must be deemed in law to have instituted the proceeding. This he considered was not correct, and the proper course for him in second appeal was to determine the question for himself. He held that it was not open to the Sub-divisional Magistrate to make an order of the kind which he did. The order he should have made was merely one requiring the plaintiff to show cause why the licence which he held under the Petroleum Act should not be cancelled. From what was contained in the petition it could not reasonably be said that the defendants intended the Magistrate to institute the proceeding which he did, and did not intend merely that he should take steps to cancel the plaintiff's licence. Therefore, it should be held that the proceeding was not in fact instituted by the defendant, but by the Sub-divisional Magistrate himself.

[5] It was in this view he allowed the appeal. He mentioned another question of some difficulty which arose, namely, whether a person against whom a proceeding under S. 133 has been instituted maliciously and without reasonable cause is entitled to recover damages by a suit in the civil Court ; but he thought it unnecessary to decide this question.

[6] I find myself unable to agree with

Shearer J. that the proceeding was not instituted by defendant 1. The fact that the respondent did not himself originate the petition is immaterial. He completely associated himself with it, and by his endorsement thereon made it his petition. The Courts have not taken a narrow view in this regard: *Taharat Karim* v. *Malik Abdul Khaliq* (19 P. L. T. 889)[1] and *Gaya Prasad* v. *Bhagat Singh* (30 ALL. 525[2] at p. 534).

[7] Moreover, I am unable to agree that what the Chairman contemplated was proceedings for cancellation of the licence. There was no request or suggestion that the licence should be cancelled, nor can it be said, in my view, that the petitioners even contemplated cancellation of the licence altogether. What was asked for was removal of the godown to a secluded place, and that is not cancellation of the licence. The complaint made seems to me clearly a complaint of public nuisance, and that is so more particularly of the Chairman's endorsement. The allegation is that the keeping of the kerosene oil godown on the place alleged was highly objectionable and dangerous to the public, If that is not a complaint of public nuisance, I do not know what it is, and I think the proceedings under S. 133, far from being without jurisdiction, were the natural consequence of the complaint made. The proceedings, therefore, must be held to have been instituted by the respondent. It has been urged before us that the respondent acted not in his personal capacity but as Chairman, and if any one could be made liable it should be the Union Committee. But obviously it is a case of the Chairman making improper personal use of his official position. The finding that he acted to satisfy his private grudge is inconsistent with any view that he acted officially as Chairman.

[8] There remains the question whether a suit for malicious prosecution would lie upon a malicious complaint of public nuisance The answer, I think, must be in the affirmative. Too much stress must not be laid on the word "prosecution." The real question is whether what was done amounted to an actionable wrong. In *Crowdy* v. *O'Reilly* (17 C. W N. 554)[3] Sir Ashutosh Mookherjee in a carefully reasoned judgment held that the word "prosecution" in respect of such a suit is not used in the limited sense in which the term is used in the Code of Criminal Procedure, and the action will lie in regard to proceedings under S. 145, Criminal P. C. The same view was taken in *Bishun Pergash Narain Singh* v *Phulan Singh* (19 C. W. N. 935).[4] Such proceedings are not purely civil. They may perhaps be called *quasi*-criminal, and the view of the law is that action lies in the case of such proceedings if malicious and without reasonable and probable cause. The principle is clear which lies behind the decisions. True it is not a actionable wrong to institute civil proceeding without reasonable and probable cause even if malice be proved, for in the contemplation of law defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour, which gives him his costs against the plaintiff. But there are proceedings which, though civil are not ordinary actions, and fall within the reason of the law which allows an action to lie for malicious prosecution. Such proceedings, for example, are proceedings in bankruptcy against a trader. Such a proceeding, if instituted without reasonable and probable cause and with malice, is an actionable wrong: *Quartz Hill Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. 674.[5]

[9] In my judgment, proceeding of a quasi-criminal type fall within this class, because they are proceedings under the Criminal Procedure Code in the Criminal Courts and there is no question of the person proceeded against being indemnified in costs. He must seek his remedy elsewhere. The plaintiff as a result of the malicious proceeding instituted suffered harassment and loss. He had to appear before the Magistrate and engage counsel, and might also well suffer scandal to reputation. Is he to have no remedy? I think that is not the law. On this point see Pollock on Torts, Edn. 14, at pp. 250 and 251. In the present case, in my judgment, all the necessary findings exist. The institution by the respondent is clear, and malice and want of reasonable and probable cause has been found. I think the suit was rightly decreed. I would, therefore, allow this appeal with costs, throughout, set aside the decision of Shearer J. and restore the decision of the learned Munsif.

[10] **Manohar Lall J.**—I agree. With respect, I would follow the closely reasoned judgment of Sir Ashutosh Mukherji in 17 C W. N. 554[3] and would hold that the proceedings started by defendant 1 must be considered to be "prosecution" in the general sense of the term, otherwise, the person proceeded against would have no remedy against the prosecutor or the person who started those proceedings. The proceedings were undoubtedly initiated by defendant 1, and I cannot conceive of a clearer case of his association with the proceedings before they reached the Sub-divisional Officer, though in the name of defendants 2 and 3, than by what he did in making the strong remarks when forwarding it to the Sub-divisional Officer of Sasaram. He writes there that he himself had been to the spot and found the keeping of the kerosene godown highly objectionable and dangerous for the public and that it must be removed. It must be remembered that the re-

marks by defendant 1 must have made a great impression on the Sub-divisional Officer as it came from a person who was in the position of a Chairman of the Union Board.

D.H. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 91** *[C. N. 36.]*

FAZL ALI C. J. AND REUBEN J.

*Shiva Sahai Ram — Appellant* v. *Sundar Mandal and others — Respondents.*

Appeal No. 473 of 1943, Decided on 7th November 1946. from appellate decree of Sub-Judge, Purnea, D/- 27th February 1943.

**(a) Civil P. C. (1908), O. 32, R. 3 (5) — Law prior to introduction of sub-r. (5).**

Even according to the law prior to the insertion of sub-r. (5) in O 32, R. 3 by the Amending Act of 1937, a guardian ad litem appointed in the suit continued to be so in the execution proceedings till his removal or death: 9 A. I. R. 1922 Pat. 256 and 24 A. I. R. 1937 Cal. 259, *Rel. on*; 12 A. I. R. 1925 Cal. 23, *Dissent.*

[Paras 2 & 3]

Annotation: ('44-Com.) Civil P. C., O. 32, R. 5, N. 3, Pt. 2.

**(b) Civil P. C. (1908), O. 21, Rr. 22 and 90—Notice on proper person as guardian—Want of—Effect—Validity of execution sale.**

A money decree was obtained against three brothers two of whom were minors who were represented by a pleader guardian ad litem appointed in the suit. The decree was sought to be executed against them by describing the minor brothers as represented by their elder brother as guardian ad litem without any steps being taken to discharge the pleader guardian ad litem appointed in the suit. The judgment-debtors' property was sold in execution and was purchased by the decree-holder:

*Held* that the elder brother had no authority to represent his minor brothers in execution as there was no order of the Court removing the pleader guardian and appointing him in his place. Hence the provision as to notice under O. 21, R. 22 was not complied with so far as the minors were concerned and therefore the Court had no jurisdiction to sell the minors' share of the property. The execution sale of the minors' share was therefore void: 27 A. I. R. 1940 Pat. 62; 13 A.I R. 1926 Cal. 109; 40 Cal. 635 (P.C.), *Disting.*; *Case law discussed.*

[Para 6]

Annotation: ('44-Com.) Civil P. C., O. 21, R. 22, N. 6, Pt. 4; O. 21, R. 90, N. 35, Pt. 1; N. 36, Pt. 7.

*Cases referred* :—

1. ('24) 28 C. W. N. 963 : 12 A. I. R. 1925 Cal. 23: 84 I. C 68, Salauddin v. Afzal Begum.
2. ('37) 24 A.I.R 1937 Cal. 259 : I. L. R, (1937) 2 Cal. 127 : 171 I. C 435, Brojendra Kishore v. Shamserali.
3. (1831) 1 Rules & M 617, Kinaman v. Kinsman.
4. ('95) 22 I. A. 44 : 17 All. 106 : 6 Sar. 526 (P. C.), Thakur Prasad v. Fakirullah.
5. ( 21) 6 Pat. L. J. 171 . 9 A. I. R. 1922 Pat. 256 : 62 I. C. 235, Raj Kishore v. Ram Ghulam.
6. ('22) 35 C. L. J. 9: 8 A. I R 1921 Cal. 476: 64 I. C. 25, Fani Bhusan v. Surendra Nath.
7. ('26) 30 C. W. N. 86 : 13 A. I. R. 1926 Cal. 109: 89 I. C 765, Matiur Rasul v. Abdul Said.
8. ( 26) 97 I. C. 181 : 13 A I R. 1926 Lah. 490, Bansi Dhar v. Mahomed Suleman.
9. ('08) 30 Cal. 1021 : 30 I. A. 182 : 8 Sar. 512 (P.C.), Wallan v. Banke Behari Pershad.
10. ('40) 27 A.I.R. 1940 Pat. 62 : 187 I C. 492, Bachoo Prasad Singh v. Gobardhan Das.
11. ('13) 40 I. A. 140 : 40 Cal. 635 : 19 I.C. 296 (P.C.), Krishna Prasad Singh v. Moti Chand.
12. ('05) 32 I. A. 23 : 32 Cal. 296 : 8 Sar. 734 (PC), Khiarajmal v. Daim.
13. (1900) 27 I.A. 216: 25 Bom. 337: 7 Sar. 739 (P.C.), Malkarjun v. Narhari.

*G. P. Sahi, S. C. Chakraverty and Sarjoo Prasad* — for Appellant.

*P. Jha and H. P. Sinha* — for Respondents.

**Reuben J.**—This is an appeal by the defendants, first party, against a decision of the Subordinate Judge of Purnea, affirming a decision of the Munsif of Purnea. The suit was brought by the two plaintiffs, respondents first party, against the appellants, defendants first party, and Darogi Mandal, defendant second party, who is the elder brother of the plaintiffs, for a declaration that the interest of the plaintiffs in the suit property is unaffected by the sale in execution of the decree in Money Suit No. 758 of 1930 obtained by the defendants, first party, against Darogi Mandal and the two plaintiffs on the basis of a handnote executed by their deceased father, Dhanpat Mandal. In that suit, the plaintiffs, who were then minors were represented by a guardian ad litem who continued as such till the suit was disposed of on 27th March 1931. The decree was put in execution in the year 1934 when the plaintiffs were still minors. In the execution petition, the minors were impleaded under the guardianship of their elder brother, Darogi, without any steps being taken to discharge the pleader guardian appointed in the suit The execution sale was held on 5th December 1934, and the property was purchased by the decree-holders, defendants first party of the present suit. An objection under O. 21, R. 90, was filed by Darogi on his own behalf and as guardian of his minor brothers; but it was finally dismissed for the default of Darogi, and the sale was confirmed, and, in due course, the decree-holders auction-purchasers got delivery of possession over the property through the Court. The plaintiffs attained majority, one of them in the year 1938 and the other in the year 1940, and they filed the present suit in the year 1941, challenging the validity of the sale so far as it related to their share in the property on the ground that they were not properly represented in the execution proceedings They also challenged the reality of the delivery of possession and asserted that they were still in possession, regarding which fact they asked for a declaration. In the alternative, they prayed for recovery of possession. The Courts below have held that the delivery of possession was real and effective, and have given the plaintiffs a decree for recovery of possession to the extent of their share on the finding that the sale is void to that extent by

reason of the non-representation of the minors in the execution proceedings. The finding regarding possession is binding upon us and it has not been challenged before us. The only points raised were: firstly, the maintainability of the suit, and secondly, the effect of the representation of the minors in the execution proceedings by their brother instead of by their pleader guardian ad litem.

[2] The point of maintainability is really dependent on the other point. It is urged that, in the execution proceeding itself, an objection under O. 21, R. 90, was filed on behalf of the minors by Darogi Mandal on the ground among others that the minors were not properly represented in the execution proceeding, and this objection was decided against the minors, and the sale was confirmed. It is argued that the minors cannot be permitted to raise the point again, and are further precluded from challenging the sale by reason of O. 21 R. 92, Civil P. C. For the minors to be bound by the result of O. 21, R. 90 proceeding, however, it is necessary that they should have been parties to that proceeding; in other words, it is necessary that they should have been properly represented in it. This is the very question which has to be considered for the purposes of the other point mentioned above. I come now to a consideration of the second point. Under O. 32, R. 3, as it now stands, it is clear that a guardian ad litem of a minor defendant appointed for the purpose of a suit continues as such for the purpose of execution proceedings in pursuance of the decree in the suit. Mr. Sarjoo Prasad for the appellants points out, however, that the amendment by which sub-r. (5) was inserted in this rule was made in the year 1937, that is, subsequent to the sale which is challenged in the present suit, and urges that, according to the accepted view previous to the amendment the appointment of a guardian ad litem terminated with the passing of the final decree in the suit. He relies for this proposition on 28 C. W. N. 963.[1] Exactly the opposite view, however, was taken by another Bench of the Calcutta High Court in A.I.R. 1937 Cal. 259,[2] where, referring to the case of *Khaja Salauddin*,[1] their Lordships said :

"In that case the learned Judges relying on certain observations of Lord Lyndhurat in (1831) 1 Rules & M 617[3] at p. 622 observed that the guardianship of the guardian ad litem appointed during the suit, terminated after the final decree made in the suit. The attention of the learned Judges however was not drawn to the decisions (22 I. A. 44)[4] of the judicial Committee to which we have already referred. Further the observations of Lord Lyndhurat were made in connection with the question of lis pendens".

[3] The view taken in A. I. R. 1937 Cal. 259[2] appears to be in accordance with the Patna view, as it was held by a Bench of this Court as long ago as the year 1921 that O. 32, R. 5, Civil P. C., applies to proceedings in execution of a civil Court decree : 6 P.L.J. 171.[5] Next, it is urged by Mr. Sarjoo Prasad that, even if Darogi was not the proper guardian to represent the minors, this was a mere irregularity and would not affect the validity of the execution proceedings, as Darogi in fact appeared and looked after the interests of the minors in the execution proceedings. I do not think that the cases relied upon by him for this contention are on all fours with the case before us. In 35 C. L. J. 9,[6] the guardian ad litem of the minor judgment-debtor was his mother, who, unknown to the decree-holder, had died before the filing of the execution petition. Therefore, when the execution petition was filed, there was actually no guardian ad litem appointed by the Court. The judgment debtors were co-tenants of one holding, and a notice under O. 21, R. 22, addressed to all the co-tenants was in fact issued, and there was nothing to suggest any divergence of interests among them. Also, all the co-tenants were living in one homestead. In these circumstances, their Lordships observed that it would be

"a refinement of technicality to say that all the co-tenants were not duly notified that the decree was to be executed,"

and held that the Courts should look at the substance of the transaction to determine whether the minor was sufficiently represented in the execution proceeding. In the view they took of the case, they were of the opinion that O. 21, R. 22, had been sufficiently complied with, and that, at the utmost, there was merely an irregularity which did not affect the validity of the proceedings, as the minor had not suffered substantial injury by reason of the irregularity. In 30 C. W. N. 86[7] the facts are clearly distinguishable, for, in that case, there was a guardian ad litem appointed in the suit, who was, in that capacity, served with the notices of execution, but he did not appear to have entered appearance. The validity of the proceedings was challenged on the ground that he was the pleader guardian appointed in the suit and was not appointed as such in the execution proceeding and, therefore, there was no proper service of the execution processes in the eye of the law. This was treated by their Lordships as an irregularity, but, on the view which I am inclined to take of O. 32, R. 3, there would be no irregularity at all, for, the pleader guardian ad litem appointed in the suit continued as such for the purpose of the execution proceedings and was rightly served with the notices of execution on behalf of the minor. In 97 I. C. 181,[8] the validity of a civil court sale in execution was challenged on the ground that a minor judgment-debtor was repre-

sented in the execution proceedings by his mother as guardian without a formal order of the Court appointing her as the guardian ad litem. Their Lordships did not accept the contention that there was no such formal appointment, relying on the fact that more than twenty-five years had expired since the date of the sale, and it was hardly to be expected that all the papers relating to the execution would be preserved for such a long time. They pointed out that no such objection was taken in the execution proceedings, which lasted for nearly two years, and referred to the presumption arising under S. 114, Evidence Act, that judicial and official acts had been regularly performed. On this finding, the remark made by their Lordships that the mere absence of a formal order appointing a guardian ad litem does not render the sale invalid is only an obiter dictum. In making the above observation, their Lordships referred to the case in 30 Cal. 1021,[9] on which case Mr. Sarjoo Prasad has placed great reliance before us. In that case the mother of certain minor defendants had appeared throughout the proceedings in the suit as their guardian; the Court admitted the plaint, in which she was described as the guardian, and, in the decree and execution proceedings, the Court also described her as the guardian. In these circumstances, it was held that, although no formal order had been made by the Court appointing him guardian ad litem, "the minors were effectively represented in the suit by their mother and with the sanction of the Court." In other words, the presumption was drawn from the circumstances of the case that the Court has sanctioned the appointment of the mother as the guardian ad litem.

[4] This case was considered in A. I. R. 1940 Pat. 62,[10] upon which the Courts below have based their decision decreeing the claim of the plaintiffs and the facts of which case are, in my opinion, on all fours with the case before us. Referring to *Walian's case*[9], their Lordships said :

"In 30 Cal. 1021[9] all the parties had for years acted on the supposition that the mother had been properly appointed and had acted as guardian lawfully and regularly The proceedings were held not to be bad merely because that understanding proved in fact to be mistaken. In effect, an arrangement had been proposed and carried out for the representation of the minor, an arrangement which, if the attention of the Court had been given to it, would have been clearly unobjectionable and would have been approved But in the case before us, it is not so; on the face of the record it was apparent that the proposal to appoint Gobardhan to represent the minors was highly objectionable for the obvious reason that there was already a guardian ad litem appointed for the suit, including the execution proceedings also, therefore an order appointing Gobardhan can hardly be supposed to have been made by implication when in the circumstances it could not be made. No doubt it was possible for the Court to remove the pleader and thereafter to appoint Gobardhan, but the Court at this stage was not asked to remove the pleader. So the condition precedent to Gobardhan being appointed or acting as guardian ad litem did not exist."

40 I. A. 140,[11] which is the next case relied on by Mr. Sarjoo Prasad, is distinguishable on the same ground. In that case, a guardian ad litem had been appointed to represent the minor in the original proceedings, which took place in the local Court of Benares. When, however, the proceedings were transferred to the Court of the Deputy Commissioner, Hazaribagh, for execution, the guardian ad item refused to act as such. In the subsequent proceedings, there was no appearance on behalf of the minor. In these circumstances, it was held that inasmuch as the interests of the infant with regard to the property in dispute were not represented in the execution proceedings, it was open to the mother as natural guardian to appear in the name of the infant to protect the property from sale.

[5] The case in 32 I. A. 23[12] has been cited on account of certain observations at page 35 :

"The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb Judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors."

The decision itself, however, helps the respondents rather than the appellants. The questions arose as to whether certain judgment-debtors whose property had been sold in execution of certain mortgage decrees, were properly impleaded in the suits, in which those decrees had been obtained, and whether their interest in the property was affected by the sales in execution of those decrees. One of the judgment-debtors was one Amirbaksh minor, who was impleaded as a defendant under the guardianship of one Alahmawas. This is how their Lordships dealt with the point :

"In Suits No. 372 of 1879 and No. 160 of 1876, the Judge seems to have accepted without question the statement on the record that Amirbaksh was legal representative of Nauraoz and Alahnawas was his guardian and never applied his mind to the matter Doubtless he would have done so if the suits had proceeded in the ordinary course, but in the former case the proceedings were cut short by the agreement for reference, and in the latter case it was in effect a consent decree It was not, therefore, the case of an erroneous decision, ruling or exercise of discretion of the Judge in a matter in which the Court had jurisdiction. Their Lordships think that the estate of Nauraz was not represented in law or in fact in either of the suits, and the sale of the property was therefore without jurisdiction and null and void. Nor can they hold that the share of Amirbaksh himself in his father's estate was bound. In the opinion of their Lordships it is not a mere question of form, but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale; but in the present case the

real purchaser was the judgment-creditor, who must be held to have had notice of all the facts."

In the present case, also, the Court did not apply its mind to the point as to whether Darogi could properly represent the minors, and, as a pleader guardian appointed by the Court was in existence, there can be no presumption that the executing Court would have removed the pleader guardian and appointed Darogi as guardian ad litem in his place.

[6] This brings me to the case in A. I. R. 1940 Pat. 62[10] to which I have already referred above. There, as here, there was a pleader guardian ad litem appointed by the Court, but, in the execution application no reference was made to him, and execution was sought against the minors describing them as under the guardianship of Gobardhan Das, brother of one minor and uncle of the other minors, who was also the managing member of the joint family. In the execution proceedings, Gobardhan Das appeared and took various steps. The property was eventually sold on 5-5-1938, and was knocked down to the decree-holders. An objection was filed under S. 47 and O. 21, R. 90, and it was in these proceedings that the question arose about the validity of the auction sale. Their Lordships held that, in the absence of an order of the Court removing the pleader guardian ad litem and appointing Gobardhan Das as guardian in his place, Gobardhan Das had no authority to represent the minors in the execution proceedings with the consequence that so far as the minors were concerned the provisions of O. 21, R. 22, had not been complied with and the legal conditions necessary for proceeding with the execution did not exist. This is exactly the case here. Darogi could not represent the minors; notice to him was not a compliance with the provisions of O. 21, R. 22; hence, the Court had no jurisdiction to proceed against the minors' share of the property. The sale held by the Court is, therefore, void as against the share of the minors. An attempt was made by Mr. Sarjoo Prasad to distinguish the case from the present one on the ground that, in that case, the question arose in proceedings under S. 47 and O. 21, R. 90, in the execution case itself, whereas, here, the question has arisen seven years later in a separate proceeding altogether. In this connection, he has referred to certain observations made by Rowland J. in that case in distinguishing the case in 27 I. A. 216.[13] That was a case in which the notice had been served on the wrong person as the legal representative of a deceased mortgagor; an objection was taken in those proceedings that the person on whom notice had been served was not the legal representative, which objection was considered by the Court on the merits and was rejected, and the property was thereupon sold. It was a case, therefore, where the Court had applied its mind to the question and had decided it. Whether that decision was right or wrong did not matter, because the Court had the jurisdiction to decide rightly or wrongly. It was on this ground that their Lordships held that the sale could not be defeated. Here we are concerned with the transaction which is found to be void; mere lapse of time, therefore, will not stand in the way of the plaintiff unless new rights have grown up by reason of that lapse of time, which is clearly not the case here. Hence, I do not consider that there is any substance in the distinction sought to be made.

[7] On the above grounds, I am of the opinion that the Courts below have rightly held that the sale was void so far as it related to the shares of the minors, and would dismiss this appeal with costs.

**Fazl Ali, C. J.** — I agree.

K.S. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 94** *[C. N. 37.]*

MANOHAR LALL AND MEREDITH JJ.

*Deoniti Prasad Singh — Applicant* v. *Commr. of Income-tax, Bihar and Orissa, — Respondent.*

Misc. Judicial Case No. 149 of 1945, Decided on 18-12-1946.

**Income-tax Act (1922), S. 10 (2) (xi) — Assessee Zamindar and money-lender — Pro-notes and mortgage bonds taken for arrears of agricultural rents — Irrecoverable loans — Bad debt.**

The assessee who was a zamindar as well as a money-lender used to obtain hand-notes and mortgage bonds which carried interest from his tenants when they fell in arrears in paying his agricultural rent. The Income-tax Department for a number of years in the past had treated the "investments" on the handnotes and mortgage bonds as being part of the money-lending business of the assessee who was taxed on a portion of the interest which he showed as having accrued due to him from these investments. In the relevant assessment year the assessee having claimed to deduct as an irrecoverable loan a certain amount out of these investments:

*Held* that these investments were a part of the moneylending business of the assessee and, therefore, his claim to have a deduction for the irrecoverable loan must be allowed. [Para 9]

*Case referred* :—

1. ('32) 19 A. I. R. 1932 Mad. 436 : 55 Mad 830 : 138 I. C. 289 (S.B.), Commr. of Income-tax v. Gopala Venkata Narasimha.

*B. N. Jain and K. P. Varma* — for Applicant.

*S. N. Dutt* — for Respondent.

**Manohar Lall J.** — This is a reference by the appellate Tribunal under S. 66 (1), Income-tax Act for the opinion of the Court upon the following question :

"Where bonds and promissory notes have been taken in lieu of arrear agricultural rents by a Zamindar, who

is also a money-lender, can the amounts of such bonds and promissory notes be said to be loans made in the ordinary course of moneylending business as contemplated in S. 10 (2) (xi), Income-tax Act, so that when such amount became irrecoverable, claim for such irrecoverable amounts may be admissible in computing the assessable income of the assessee ?"

[2] The question formulated arose out of assessment proceedings of the assessee for the years 1942-43 and 1943-44, and although a single reference has been made, it is necessary to state the facts for the year 1942-43 assessment first.

[3] The assessee carries on business as a money-lender and also has a large zemindary. When the tenants of the assessee fell in arrears in paying his agricultural rent, he instead of suing them in the civil Courts obtained handnotes and mortgage bonds from a large number of his tenants. Althongh no handnote or mortgage bond has been produced before us or is to be found in the record, it is admitted that the handnotes and the mortgage bonds carry interest at varying sums according to the circumstances of the particular borrower or executant rather.

[4] The assessment proceedings for the year 1938-39 are printed as Exs. 12 and 13. The order of the Income-tax Officer (Ex. 12) shows that the assessee was found not to have given a complete and exhaustive list of investments including the investments on the handnotes and the mortgage bonds taken from the agricultural tenants, and, therefore, a sum of Rs. 24,000 was added to his income under the head 'moneylending.' This assessment was made on 27-2-1939. In appeal, the Appellate Assisant Commissioner by his order dated 27-5-1940, reduced this sum of Rs. 24,000 to Rs. 12,645. His reasoning is to be found at p. 45 and may be conveniently quoted here :

"The assessee obtained handnotes and mortgage bonds from a large number of tenants in lieu of arrear agricultural dues. Interest of Rs. 139 was realised on such documents. These documents were not shown as it was thought that these were not taxable. The total amount of such documents obtained in lieu of arrear rent is admitted to be Rs. 67,000. But in actual practice principal sum only being arrear rent is realised after remitting interest."

[5] In this case the Income-tax Officer has added a further income of Rs. 24,000. I think the sum added by the Income-tax Officer is very high. The so-called omissions and discrepancies as noted by the Income-tax Officer have been satisfactorily explained in most cases. But in the case of Bajrang Prasad Singh Rs. 2645 interest income has to be taxed. Besides for possible omission to show interest bearing investment as in the case of document worth Rs. 67,000 obtained from tenants in lieu of arrear rents a further sum of Rs. 10,000 may be added. There is no excuse for omitting to show investment worth Rs. 67,000 on documents obtained from agricultural tenants. Hence, Rs. 12,645 will have to be added in this case against Rs. 24,000 added by the Income-tax Officer. Therefore there will be a reduction of Rs. 11,355. It is, therefore, clear that the handnotes and the mortgage bonds obtained by the assessee from his agricultural tenants were treated as his investments in moneylending business by the Department, and the assessee was actually taxed on a sum of Rs. 10,000 taken as accrued interest on these investments in the assessment year 1938-39.

[6] In the year 1941-42 the same basis of taxation was adopted. The order of the Income-tax Officer is not on the record, but the appellate order of the appellate Assistant Commissioner is exhibit 14, which shows that the assessee was allowed to deduct Rs. 2265 as irrrecoverable loan on the hand-notes secured in lieu of arrears of rent due from the tenants. This is made clear in para. 13 at p. 47:

"The assessee claimed Rs. 2265 as irrecoverable loan covered by handnotes secured in lieu of arrear of rent. These loans were treated by the Income-tax Officer as money-lending investments after the arrears were secured by handnotes and a sum of Rs. 1293 has accordingly been taxed under money-lending. The Income-tax Officer has disallowed the claim on the ground that the dues were nothing but rent dues and no money-lending loan was advanced. But in accordance with the Ruling in A. I. R. 1932 Mad. 436[1] as soon as a handnote is executed in satisfaction of arrear rent there is a new contract and the liability ceases to be rent and becomes a loan. If the Income-tax Officer had taxed the interest on arrear rent under other source the position would have been different but as the income has been taxed under money-lending, I am afraid the position taken by the Income-tax Officer cannot be supported. Therefore Rs. 2265 will be allowed."

It is, therefore, clear that in this year also the Income-tax Department actually taxed the assessee on a sum of Rs. 1293 on account of the interest which accrued due on these investments made with the agricultural tenants and this interest was taken as income from money-lending.

[7] In the year 1942-43 which relates to the accounting period March 1941 to March 1942, the assessee claimed a sum of Rs. 3292 as the sum that had become irrecoverable in these investments made with the agricultural tenants. This question is discussed under the head 'Karji Dehat,' that is to say, loans in the villages, at p. 10 by the Income-tax Officer. The discussion shows that the assessee showed an income of Rs. 428 in respect of these loans to the tenants, but claimed that a sum of Rs. 3720 had become irrecoverable. This claim was disallowed upon the ground that in respect of some of the tenants the assessee had taken the properties of the debtors and the price of these lands will be far more than the amount of land revenue in default, and in respect of some other tenants their properties were pur-

chased by outsiders long before the year under consideration:

"And so these debtors had no assets before the year under consideration and this was in the knowledge of the assessee, they being his tenants. So these debts became irrecoverable long before the period under consideration. In view of all these facts I disallow the claim. I have not taken any income this year as there has been remissions to cover the income of Rs. 428, the biggest item of remission being Rs. 341 to Sidheshwar Singh."

This quotation shows that even in this year the Income-tax Officer accepted the position that these investments with the agricultural tenants were part of the money-lending business of the assessee. He included Rs. 428 on account of interest which accrued due, but as the assessee had shown that he had remitted a larger sum than this amount, no income under this head was taken as a part of the assessable income. This order was passed on 23rd March 1943. The appeal was disposed of by the Appellate Assistant Commissioner on 27th February 1944, and this particular question was discussed at p. 18, para. 7. He observed that these debts arose out of contracts relating to agricultural matters and the assessee had not shown to him that they had even figured as stock in trade in the money-lending business being the assessed subject. In this view of the matter he upheld the Income-tax Officer's order disallowing the claim for these bad debts some on the ground of point of time and the others being outside the business. The assessee then went up to the Appellate Tribunal who disposed of the appeal on 20th December 1944. They pointed out in their order in para. 9 that the reasoning of the Income-tax Officer that the loans had become irrecoverable before the year of account was not supported seriously by the Income-tax Department before them and in the succeeding paragraphs they came to the conclusion that as these loans did not have their origin in money-lending itself, their irrecoverability did not make them a bad debt of the money-lending business.

[8] At the instance of the assessee the Appellate Tribunal have made this reference to us as already stated. In their order dated 26th July 1945, they appeared to take the view that there is nothing anywhere on the record to show that interest income from bonds and pronotes taken in lieu of arrear agricultural rent was treated by the department as income from money-lending business. They say that they had seen the records for 1939-40 and 1940-41 and

"there too interest on such bonds and pronotes was lumped up with money-lending income: there too there are loose discussions about interest on bank deposits, debenture interest and dividend under money-lending,"

and that both the assessee and the Income-tax Officer went on loose ideas and thought only of 'convenience,' but did not proceed on any strictly legal principle. While considering the Income-tax Officer's assessment order of 1938-39 and the appellate order of the Appellate Assistant Commissioner, and the 1941-42 appellate Order of the Appellate Assistant Commissioner they observed at page 2:

"It cannot, therefore, be said that these orders are conclusive of the fact that these officers proceeded on the footing that the bonds and pronotes were a part of the appellant's money-lending business after they were taken in lieu of arrears of agricultural rent."

Accordingly they have given their opinion that it could hardly be said that the department treated these bonds and promissory notes as ordinary money-lending transactions and, therefore, the department was now debarred from treating them otherwise.

[9] In our opinion, this view of the Appellate Tribunal is wrong. The Income-tax Department for a number of years in the past have treated these investments—to use an expression which has been adopted by the Income-tax Officers in various years referred to above—as being part of the money-lending business of this particular assessee, the assessee was taxed on a portion of the interest which he showed as having accrued due to him from these investments and in one year as much as Rs. 10,000 was added on to the assessable income under this head. It may be that this was as a result of a loose idea or an inaccurate appreciation of the legal position, but this defect was common both to the assessee and to the Income-tax Department. The department cannot be allowed to blow hot and cold at the same time. They cannot be allowed to treat the investments as a part of money-lending transactions of the assessee when it suits them, and when it comes to the question of disallowance of irrecoverable loans out of these very transactions they cannot be permitted to take up the position that these were not a part of the money-lending transaction of the assessee. Upon the facts of this particular case it must be held that these investments are a part of the money-lending business of this assessee and, therefore, his claim to have a deduction for the irrecoverable loans must be allowed. In this view of the matter the question of law as propounded to us does not strictly arise for decision because on the facts found it must be held that these irrecoverable loans were made by the assessee in the course of his money-lending transaction. The answer to the question is in the affirmative. The assessee must be given a deduction for Rs. 3292 on account of bad and irrecoverable loans during the assessment year 1942-43.

[10] The assessee is entitled to have his costs which we assess at Rs. 250. The Appellate Tribunal will also return to the assessee the fee of Rs. 100 deposited by him.

[11] For the assessment year 1943-44, the facts are exactly the same. In this case the assessee's claim for a deduction of Rs. 2461 on account of bad and irrecoverable debts in the village investments must also be allowed for the reasons just given. We do not make any separate order for the costs of this Court in this case, as the two cases were heard together and no separate argument was advanced in this case, it being agreed that the decision in the two cases would be the same. But if the assessee has deposited any separate fee of Rs. 100 with the Appellate Tribunal, it must be returned to him.

**Meredith J.** — I agree.

V.R. *Reference answered.*

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## A. I. R. (35) 1948 Patna 97 *[C. N. 38.]*

BENNETT AND BEEVOR JJ.

*Mohamad Idris Haider, Defendant and others, Plaintiffs — Appellants* v. *Mohammad Habibur Rahman — Respondent.*

Appeal No. 180 of 1944, Decided on 13-11-1946, from original decree of Second Addl. Dist. Judge, Monghyr, D/- 18-8-1944.

**(a) Civil P. C. (1908), S. 96 (3)—There is difference between appeal against order recording compromise and appeal against decree passed thereon — Latter is barred under S. 96 (3) — Former is not barred even after decree is prepared — Civil P. C. (1908), O. 43, R. 1 (m).**

Section 96 (3) clearly bars any appeal from a decree passed on consent. There is a difference between an appeal against an order recording a compromise and an appeal against the decree passed thereon. The right of appeal provided by O. 43, R. 1 (m) is not lost by reason of a decree having been prepared : 16 A. I. R. 1929 Pat. 318 and 20 A. I. R. 1933 Pat. 306, *Rel. on.* [Para 6]

Annotation: ('44-Com.) C. P. C., S. 96, N. 15, Pt. 15.

**(b) Civil P. C. (1908), O. 6, R. 17 — Memorandum of appeal—Amendment of—Court cannot allow, by amendment, appeal against one decree or order to be substituted for appeal against another decree or order.**

There is no specific power to allow amendment of a memorandum of appeal except under O. 6, R. 17. There is no power in the Court to allow by amendment an appeal against one decree or order to be substituted for an appeal against another decree or order: 9 A.I.R. 1922 P. C. 249, *Rel. on.* [Para 7]

Per *Bennett J.* — There is no provision of the Civil Procedure Code, expressly governing the amendment of a memorandum of appeal once it has been admitted. The effect of S. 107 in regard to the amendment of a memorandum of appeal is, however, to apply thereto, *mutatis mutandis*, the provisions of the Code relating to the amendment of a plaint. But an amendment is a matter which leaves unaltered the fundamental nature of the thing amended. If an amendment purports to go beyond that point, it ceases to be an amendment. [Para 19]

Annotation : ('44-Com.) C. P. C., O. 6, R. 17 N. 3.

**(c) Civil P. C. (1908), O. 23, R. 3 — Suit under S. 92 can be compromised under O. 23, R. 3—Consent of Advocate-General is not necessary for such compromise — Compromise in case of public trust sacrificing its interests is not lawful — Civil P. C., (1908), S. 92.**

There is nothing in O. 23, R. 3 which suggests that any particular form of suit is outside its scope though the question as to what is a lawful agreement or compromise will vary with the varying character of different suits. There is nothing to prevent a suit under S. 92 from being compromised like any other case. But the Court has plenary power to subject the terms to scrutiny and reject the compromise for valid reasons. In the case of a public trust, no compromise can be said to be lawful under O. 23, R. 3 which sacrifices its interests : 17 A. I. R. 1930 Mad. 629; 12 A. I. R. 1925 Cal. 187 and 31 A. I. R. 1944 Pat. 115, *Rel. on.* [Paras 9 & 10]

*Held*, considering the terms of the compromise in this case that the compromise was lawful and its terms were to the benefit of the trust. [Para 17]

The plaintiffs in a suit under S. 92 certainly have to obtain the consent of the Advocate-General before instituting the suit but once the suit is validly instituted the consent of the Advocate-General would not be necessary for the validity of a compromise entered into in such a suit : 25 A. I. R. 1938 P. C. 184, *Foll.* [Para 12]

Annotation : ('44-Com.) C. P. C., S. 92 N. 29 Pt. 2; N. 25 Pt. 17.

**(d) Limitation Act (1908), S. 5—Suit under S. 92, Civil P. C., compromised — Plaintiffs filing appeal against decree on compromise on ground that original petition of compromise has been tampered with in favour of defendant — Application under S. 5, Lim. Act, for permission to file appeal against order recording compromise and to condone delay — Conduct of applicants personally disentitling them to such indulgence — Court will grant application as public interests are involved.**

Where in a suit under S. 92, Civil P. C., the parties enter into a compromise and a decree is passed on the compromise and the plaintiffs file an appeal against the decree instead of the order recording the compromise on the ground that the compromise does not represent the true agreement between the parties and that the original petition of compromise had been tampered with in the interest of the defendant and an application under S. 5, Limitation Act, is made to permit the plaintiffs to file an appeal against the order recording the compromise and to condone the delay in filing the appeal, the Court would be reluctant to refuse the application on proper terms even if the conduct of the applicants has been such as to disentitle them personally to any indulgence, as the interests of the public are involved and sufficiently grave allegations are made in the memorandum of appeal to warrant an enquiry into the effect of the compromise upon the public interest. [Para 19]

*Cases referred* :—

1. ('29) 8 Pat. 528 : 16 A. I. R. 1929 Pat. 318 : 117 I. C. 189, Sabitri Thakurain v. Mrs. F. A. Savi.
2. ('33) 12 Pat. 359 : 20 A. I. R. 1933 Pat. 306 : 145 I. C. 1, Sabitri Thakurain v. Mrs. F. A. Savi.
3. ('21) 48 Cal. 832 : 9 A. I. R. 1922 P. C. 249 : 48 I. A. 214 : 63 I. C. 914 (P. C.), Ma Shwe Mya v. Maung Mo Hnaung.
4. ('04) 8 C. W. N. 404, Gyananda Asram v. Kristo Chandra.
5. ('14) 18 C. W. N. 1264 : 2 A. I. R. 1915 Cal. 193 : 26 I. C. 360, Abdul Karim v. Abdus Sobhan.
6. ('08) 31 Mad. 236 : 35 I. A. 176 (P. C.), Sankaralinga Nadan v. Rajeshwara Dorai.
7. (15) 38 Mad. 850 : 2 A. I. R. 1915 Mad. 561 : 23 I. C. 72, Sunderambal Ammal v. Yogavanagurukkal.
8. ('30) 53 Mad. 398 : 17 A. I. R. 1930 Mad. 629 : 124 I. C. 602, Narayanaswami Mudali v. Board of Commrs. for the Hindu Religious Endowments.

**9.** ('25) 12 A. I. R. 1925 Cal. 187 : 80 I. C. 44, Abu Mahomed Barkat Ali v. Abdur Rahim.
**10.** ('28) 55 Cal. 519 : 15 A. I R. 1928 P. C. 16 : 55 I. A 96 : 108 I. C. 361 (P.C.), Abdur Rahim v. Mahomed Barkat Ali.
**11.** ('38) 25 A. I. R. 1938 P. C. 184 : I. L. R. (1938) Lah. 383 : 32 S. L. R. 749 : 65 I. A. 198 : 174 I. C. 870 (P. C.), Mt. Ali Begam v. Badraul Islam Ali Khan.
**12.** ('44) 31 A. I. R. 1944 Pat. 115 : 212 I. C. 35, Banabehari Puri v. Ananda Puri.

*Sarjoo Prasad and S. M. Saleem* — for Appellants.
*S. N. Haq* — for Respondent.

**Beevor J.** — This is an appeal against a decision of the Second Additional District Judge of Monghyr who, on 18-8-1944, directed that a certain compromise be recorded and that a suit, which was brought under the provisions of S. 92, Civil P. C., be decreed in terms of the compromise petition.

[2] The suit out of which this appeal arises has had a long and chequered career. The suit was filed on 13-5-1935 by five Muhammadans against one other Muhammadan who was described as sajjadanashin and mutwalli of the Khanqah Qasba Bari Ballia. In the plaint it was alleged that there was a public religious and charitable trust to which various properties had been dedicated and that the defendant was in sole charge of the administration of the trust and the trust funds. The plaintiffs claimed a declaration that the defendant had been guilty of acts of mismanagement, misfeasance and breach of trust, that he be removed from his office and a proper person appointed in his place, that a scheme of management be framed and that the defendant be ordered to render accounts. There was also a claim for appointment of a Receiver *pendente lite* and a claim for costs and incidental relief. The way in which the suit was dealt with at first is set out in a judgment of this Court arising out of a later title suit and dated 19-8-1941 and printed at p. 44 of the paper book. By consent of parties the dispute in the suit was referred to arbitration and an award was filed, but it was found that the award dealt with certain matters beyond the scope of the suit. The Judge was disposed to remit the matter to the arbitrator and then a new suggestion was made that a compromise embodying substantially the result of the arbitration be filed and a decree passed in accordance with the compromise. A compromise petition was accordingly filed on 11-9-1937 and a decree prepared on 1-10-1937. Thereafter, the plaintiffs brought a suit for a declaration that the terms of the decree and the compromise petition then found on the record of the District Judge's title suit did not represent the true agreement between the parties, that a draft compromise petition had been prepared embodying different terms and a petition had been signed and presented to the Court accordingly, but that the petition had been tampered with in the interest of the defendant by substituting different pages of type-written matter for some of the pages. That suit was tried by a Munsif who found that the allegations of the plaintiffs were true and his decision on this point was upheld on appeal. The Munsif had allowed an amendment of the plaint in the title suit before him whereby a prayer was added that a certain original petition be substituted for the alleged false petition in the record of the District Judge and a fresh decree prepared accordingly, and he granted this relief On second appeal, it was held that the final order of the Munsif could not stand so far as it directed that there should be any substitution of paper on the record of the District Judge and that a decree be drawn up in accordance therewith. It was held that all the Munsif had power to do was to declare the facts what he found them to be and that in consequence the decree of the District Judge must be and should stand as vacated. It was pointed out in the judgment of this Court that it would then be for the parties to go to the District Judge and ask him to revive title suit No. 2 of 1935 (the suit out of which this appeal arises) and dispose of it according to law. After that decision of this Court, an application was made to the District Judge to reopen this title suit and he revived the suit accordingly. It was subsequently transferred to the Second Additional District Judge who heard the parties on the question whether the compromise petition, which was marked X before him, could be given effect to as a lawful compromise or not He answered this question in the affirmative and proceeded to dispose of the suit in the way I have already mentioned.

[3] This appeal was filed by means of a memorandum of appeal presented on 11-10-1944. In that memorandum it is stated :

"Being aggrieved by and dissatisfied with the judgment and decree passed by Rai Sahib, J. K. Narayan, Second Additional District Judge, Monghyr, in title suit No. 2 of 1935 on 18/8/44 beg (i. e., the appellants beg) to prefer this appeal on amongst others the following grounds."

Thereafter the grounds are set out.

[4] The appellants to this Court are the defendant and four out of the five plaintiffs. The appellants have not disputed that they did in fact agree to the compromise in the form in which it now stands on the record in accordance with which the Additional District Judge has passed a decree. They have, however, taken various grounds in support of their contention that the compromise is not a lawful one and that no decree can or should be passed in accordance therewith. Before us the contentions on behalf of the appellants fall under three main

heads: first, that O. 23, R. 3, Civil P C., does not apply to suits under S. 92, Civil P. C.: secondly the various terms of the compromise were prejudicial to the trust, and thirdly that effect could not be given to the compromise because it purports to deal with certain properties in Sch. 3 which stand in the name of the wife of defendant appellant 1 and she is no party to this suit. One or two subsidiary points were raised with which I will deal in due course.

[5] A preliminary objection was raised on behalf of the respondent that the present appeal was incompetent as an appeal against a decree passed by consent. The appellants urged that the appeal should be treated as in substance an appeal against the order recording the compromise which would be maintainable as an appeal against an order. Under O. 43, R. 1 (m), Civil P. C., they also filed a petition for permission to amend the memorandum of appeal by substituting the word "order" for the word "decree" therein. The respondent contended that the memorandum of appeal clearly constituted an appeal against the decree and not against the order recording the compromise and that the proposed amendment could not and should not be allowed.

[6] Dealing first with the preliminary objection, I find that the memorandum of appeal clearly constituted an appeal against the decree and not an appeal against the order recording the compromise. This is supported by the fact that the court-fees paid thereon are those proper for an appeal against a decree and not for an appeal against an order. Section 96 (3), Civil P. C., clearly bars any appeal from this decree passed on consent. The case in 8 Pat. 528[1] shows that the right of appeal provided by O. 43, R. 1 (m) against an order passed under O. 23, R. 3 recording a compromise is not lost by reason of a decree having been prepared. I cannot accept the contention on behalf of the appellants that there is no substantial difference between an appeal against the order recording the compromise and an appeal against the decree based thereon. The distinction between the two is made clear by a passage in the judgment in 12 Pat. 359[2] at pp. 614 and 615. That passage shows that an appeal against an order recording the compromise was admitted under O. 43, R. 1 (m) and before that appeal was disposed of, an appeal against the decree itself was presented and dismissed, yet the Judges went on to deal with the appeal against the order recording the compromise on its merits. I, therefore, come to the conclusion that the appeal as it stands is barred by S. 96 (3), Civil P. C.

[7] As regards the application to amend the memorandum of appeal, it seems that there is no specific power to allow amendment except under O. 6, R. 17 which states that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Dealing with this provision of law the Privy Council in 48 Cal 832[3] stated :

"All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment may be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suits."

Although their Lordships were dealing with an application for amendment of the plaint and their words, therefore, did not deal specifically with the case of an appeal, it seems to me that the same principle must apply and that there is no power in the Court to allow by amendment an appeal against one decree or order to be substituted for an appeal against another decree or order.

[8] It seems to me that what the appellants seek by way of an amendment could only be granted on an application under S. 5, Lim. Act, to permit them now to file an appeal against the order recording the compromise and to condone the delay in filing that appeal. The conduct of the appellants in the suit has been such that I do not think that they personally are entitled to any indulgence but as this is a suit dealing with a public trust and the interests of the public are, therefore, involved, it may well be that the Court would favour such an application in the interest of the public if it appeared that the interests of the public were in any way prejudiced by the decree now under appeal or the order recording the compromise on which that decree is based. As we have heard the appeal on the merits and have thus considered the interests of the public, I will return to this matter after dealing with the merits of the appeal.

[9] In support of the appellants' contention that no compromise could be recorded in a suit under S. 92, Civil P. C., I would point out first that O. 23, R. 3 runs as follows :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

There is nothing in this rule which suggests that any particular form of suit is outside its scope

though no doubt the question what is a lawful agreement or compromise will vary with the varying character of different suits. The first case on which the appellants relied in support of this contention of theirs is the case in 8 C. W. N. 404.[4] That was a case dealing with a suit under the Religious Endowments Act (Act 20 [XX] of 1863) and the learned Judges pointed out that S. 539, Civil P. C., 1882 (equivalent to S. 92 of the present Code) is much wider than the suit framed under that Act. I, therefore, do not think that that decision is any clear authority on the point now raised. That decision was certainly followed by the Calcutta High Court in 18 C. W. N. 1264[5] which was a case dealing with a suit under S. 92, Civil P. C. In that case however, there was a clear finding that if the compromise were allowed the persons interested in the mosque in question would be very considerably prejudiced, and the case does not seem to lay down a rule that no compromise can ever be recorded in a suit under S. 92, Civil P. C.

[10] The decision of the Privy Council in 31 Mad. 236[6] was not a decision in a suit under S. 92 though it was a case dealing with a public trust, and it is quite clear that there was no compromise which was really in the interest of the trust. The decision of the Madras High Court in 38 Mad. 850[7] is another case in which there was a clear finding that the terms of the compromise themselves were not legal, and again it is clear that the learned Judges were not dealing with a suit under S 92, Civil P. C., because the suit was filed in the Court of a Munsif. The case in 53 Mad. 398[8] arose out of a suit brought by a Board of Commissioners for modification of a scheme under the Madras Religious Endowments Act. It seems that the suit was one under S. 92, Civil P. C., though this is not specifically stated in the judgment. The District Judge refused to record a compromise arrived at between the plaintiff and certain defendants. It seems to me that this decision is strongly against the appellants' contention. Venkata Subba Rao J. stated in his judgment:

"There is nothing to prevent cases of this kind from being compromised like other cases, but it seems to us plaint hat the Court has plenary power to subject the terms to scrutiny and reject the compromise for valid reasons. We would go further and say that if any party opposes a compromise from sordid motives or on improper grounds, the Court, even then, has a right to take suitable action. These in our opinion are the principles that should guide the Courts. But we may rest our judgment on narrower grounds. In the case of a public trust, no compromise can be said to be lawful which sacrifices its interests : on the ground, therefore, that a compromise entered into without due regard to the trust, is under O. 23, R. 3, an unlawful agreement our conclusion may be supported."

I would reserve my opinion on the views expressed by the learned Judge as to the Court's powers to take suitable action if any party opposes a compromise on improper grounds because I am not sure exactly what the learned Judge had in mind, but subject to this reservation, it seems to me that the learned Judge has set out with admirable clarity the principles to be applied in dealing with an application to record a compromise in a suit under S. 92, Civil P. C.

[11] The learned Additional District Judge relied on a decision of the Calcutta High Court in A. I. R. 1925 Cal. 187[9] for the proposition that "order 23, Civil P. C., dealing with adjustments of suits does not restrict the jurisdiction of a Judge to pass a decree on the basis of a compromise in a suit brought under S. 92, Civil P. C."

It has been pointed out that that decision was reversed by the Privy Council in the case reported in 55 Cal. 519.[10] The learned Additional Judge had however recognised that fact, and I think he was right in saying that their Lordships of the Privy Council did not appear to have dissented from the above proposition. I would go further. In the course of their judgment their Lordships stated in dealing with a decree passed on a compromise in a suit under S. 92, Civil P. C. :

"It is extremely doubtful whether a decree passed in the circumstances of this case can be held to be *res judicata* as against any persons other than those who consented to that decree."

If the contention of the present appellants that no decree could be passed on compromise in a suit under S. 92, Civil P. C., were correct, their Lordships would hardly have expressed any doubt about the matter.

[12] It was urged that the consent of the Advocate-General was necessary to the validity of the compromise. The plaintiffs certainly had to obtain the consent in writing of the Advocate-General under S. 92 (1) before instituting a suit, but the decision of the Privy Council in A. I. R. 1938 P. C. 184[11] at p. 186 lays down that "there is no provision whatsoever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or any proceedings in appeal. As sub-s. (2) of S. 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted, it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular."

From this, I think, it clearly follows that the validity of a compromise does not depend on any consent of the Advocate-General.

[13] As regards the merits of the terms of the compromise, the learned Additional District Judge has considered them in detail with reference to the question whether they would be prejudicial to the interests of the trust and has come to the conclusion that they are not. Before us four particular terms of the compromise have been challenged. These are set out in para. 2 (e) of the compromise petition embodied in the decree and

shown under heads (s), (t), (u) and (v) printed at p. 12 of the paper book.

[14] Heading (s) is "Allowance to the Sajjadanashin 0-2-6 out of the entire 16 annas income of the estate—Rupees 753-7-0", and heading (t) is "Haq Toliyat to the mutawalli to the extent of 0-1-3 out of the entire 16 annas income of the estate—Rs. 376-11-0." It has been pointed out that there was some scheme of arrangement in 1234 Fasli which is equivalent to 1827 A D. The allowances then granted to the Sajjadanashin were certainly somewhat lower, but it cannot be in the interest of the trust that that figure should be regarded as immutable The amounts under heads (s) and (t) were challenged with reference to the allegation in para 2 (e) of the compromise that the present income of the *wakf* estate is calculated to be Rs. 5072-3-10½. It was pointed out that the plaintiffs in the plaint alleged that the income was considerably higher about Rs. 9000. This, however, does not seem to me important because the plaintiffs must have been somewhat in the dark as to the exact income, and the compromise itself disclosed that it was reached through the intervention of five persons, four of whom were outstanding Muhammadans of the district while the fifth was a responsible Hindu practising as a pleader in the district. It is difficult to believe that they would have approved of a compromise which did not give a fair estimate of the income. It may be noted that the compromise does provide for dealing with excess income on charitable purposes namely education.

[15] Headings (u) and (v) relate to, first, a donation to the Anjuman Hammayat Islam, Monghyr of Rs 50 and secondly, a scholarship to four Muhammadan students reading in Begusarai English High School at Rs. 4 per month. It is pointed out that in para 2 (a) it was stated that the intention of the *wakf* was to utilise the income of the properties on headings (a) to (f) which are as follows : (a) Warid and Sadir Foqara Moakin and poor. (b) Performance of chiraga and Neaz of the Dargah. (c) Celebration of Moharrum festival. (d) Establishment of a Madrasa for the education of boys. (e) On the poor people of Balliah at the time of marriages in their families. (f) Maintenance of the descendants of Syed Alauddin Bukhari Rahmatullah Alaih, and it is contended that these items (u) and (v) did not fall within the objects of the trust so set out. I think the answer to this contention is that the compromise petition cannot be construed so strictly as would be proper in the case of a trust deed in England, and that these heads were only intended as rough guides of the nature of the objects of the trust. The learned Additional District Judge pointed out in his judgment that it was conceded before him that the terms of the *wakf* had been clearly stated in para. 14 (a) of the plaint. That paragraph runs as follows :

"14. That the objects of the *wakf* of the Khanquah of Bari Ballia may be classified under two main heads or items namely :

(a) Purely charitable and religious purposes which under the directions given in the sanad or instruments of dedication or by long customary user have been devoted to the use and benefit of Fakirs, needy and forlorn tranvellers and casual visitors to the Khanqah Chiraga, Urs and Neyaz in the Dargah, Moharram expenses and the maintenance and up-keep of the Khanqah, the Madarsa, the mosque, the Imambara, the Karbala, the Mosafirkhana, the family graveyard and the public graveyard and in giving gratuitious aid to deserving persons both Hindus and Mahammadans on the occasion of marriage or death in their families and to other pious purposes arising therefrom or kindred thereto."

I agree with the learned Additional District Judge that the words "and to other pious purposes arising therefrom or kindred thereto" are quite wide enough to cover the expenditure under headings (u) and (v) specified above. In fact I think that such expenditure was obviously the sort of expenditure which was contemplated by this trust, though at the date of the trust itself it could not be contemplated that the expenditure would take exactly this form because there was no such thing as a High School at Begusarai in those days and probably no Anjuman Islam, Monghyr.

[16] I agree with the learned Additional District Judge that there is nothing improper in the provision that the appellant-defendant 1 should consult the plaintiff-respondent regarding the management of the trust, as he had pointed out. The compromise does not state that defendant 1 would be bound by the advice of the plaintiff-respondent. The provision for consultation may well be a good method for securing that some responsible outsider should have access to information which would enable a watch to be kept on the proper administration of the trust property.

[17] In my opinion the learned Additional District Judge has rightly considered that the compromise in this case was a lawful one and that its terms were to the benefit of the trust. In these circumstances there is no justification for allowing any belated application under S. 5, Limitation Act to avoid any possible prejudice to public interest. For these reasons I would dismiss this appeal, and would direct that the appellants pay the respondent s costs.

[18] **Bennett J.**—This is an appeal against a decree under O. 23, R. 3, Civil P. C., embodying a compromise in a suit under S. 92 of the Code, relating to the administration of a public trust which we have allowed to be argued as if it

were an appeal against the order recording the compromise. I have no sympathy with the appellants because I have come to the conclusion that they are primarily actuated by a desire to get rid of a compromise which they now regret rather than by any anxiety on behalf of the public trust. That, however, would not in itself constitute any sufficient reason for dismissing the appeal. I agree with the judgment delivered by my learned brother who has fully set out the facts of the case and the points relied upon in support of the appeal and I would only state very shortly in my own words my reasons for dismissing the appeal.

[19] I think that the plea under S. 96 (3), Civil P. C., in bar of the appeal against the decree must succeed and I do not think that an amendment of the memorandum of appeal converting the same into an appeal against the order recording the compromise can be allowed. There is no provision of the Code of Civil Procedure expressly governing the amendment of a memorandum of appeal once it has been admitted. Section 107, Civil P. C., however, provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. The effect of this section, in regard to the amendment of a memorandum of appeal, appears to me to be to apply thereto, *mutatis mutandis*, the provisions f the Code relating to the amendment of a plaint. An amendment, however, is a matter which leaves unaltered the fundamental nature of the thing amended. If an amendment purports to go beyond that point, it ceases to be an amendment. The decision of the Privy Council in 48 Cal. 832,[3] is a direct authority for this proposition so far as the amendment of a plaint is concerned, and in this respect, I see no reason to distinguish between a plaint and a memorandum of appeal. In regard to an application for extension of time under S. 5, Limitation Act, if this were a suit between private parties, I doubt if sufficient cause exists to accede thereto; since, however, in this case, the interests of the public are involved and sufficiently grave allegations are made in the memorandum of appeal to warrant an inquiry into the effect of the compromise upon the public interest, I should myself have been reluctant to refuse the application upon proper terms, especially as, as was pointed out in A.I.R. 1944 Pat. 115,[12] in such a case even if no appeal lies, the High Court can interfere under its revisional powers if the interests of the public institution have not been considered by the lower Court in passing the order recording the compromise.

[20] I find it impossible to accept the contention that O. 23, R. 3, Civil P. C., does not cover a suit brought under S. 92, Civil P. C. The use of the word 'suit' in the rule is obviously general and the wording of the rule is quite plain and unambiguous. I can find nothing in S. 92 or in any other statutory enactment inconsistent with the plain wording of O. 23, R. 3, Civil P. C. Apart from authority, therefore, I should feel myself bound by the plain wording of the rule. No authority binding upon this Court to the contrary was cited on behalf of the appellants. In A.I.R. 1944 Pat. 115,[12] however, a Division Bench of this Court after considering the authorities on the point decided that a suit under S. 92, Civil P. C., is covered by O. 23, R. 3. That authority, which happily coincides with my own reading of these two statutory provisions, is binding upon me and, therefore, conclusive.

[21] For the reasons given by my learned brother I agree that the consent of the Advocate-General to the compromise of a suit brought with his sanction under S. 92, Civil P. C., is not necessary.

[22] In considering whether the terms of the compromise go beyond the purposes for which the public trust in question was founded, we have to bear in mind that the compromise was the result of an arbitration before five persons of standing and respectability who obviously went into every aspect of the dispute including the objects of the trust. In assessing their conclusion as to those objects, I think that we have to look at the compromise as a whole and that we must assume that it was not intended in one part of the document to contradict what is stated in another part. All the parts must be read together if they are susceptible of being so read. I think, therefore, that it would be wrong to accept para. 2 (A) thereof, which is set out in the judgment of my learned brother, as an exclusive statement of the objects of the trust. I think that the compromise must be interpreted as stated that, in addition to the general objects so referred to, the specific objects mentioned under the agreed heads of expenditure in para. 2 (e) also come within the objects of the trust. If that is so, it was for the appellants to show aliunde that any specific item of expenditure authorised by the compromise was outside the objects of the trust. The only guides upon the point are the statement of the objects of the trust in para. 14 (a) of the plaint, which has been quoted by my learned brother, the admission in para. 15 of the written statement that

"a Sajjadanashin does give alms and food to Fakirs, needy travellers and visitors who came or come to him and does celebrate Urs, Moharram and perform Neaz in the Dargah, maintains Khanqah, mosque, Imambara,

Madrasa (School) and mosafirkhana and family graveyard."

and the fact, that though the defendant-appellant 1 in this Court, denied in para. 15 of the written statement that the sajjadanashin maintained any public graveyard or performed chiraga or gave gratuitous aid on the occasion of marriage or death in the family of any person there was no denial of the final phrase in para. 14 of the plaint "to other pious purposes arising therefrom or kindred thereto". I see no sufficient reason, therefore, for supposing that the items of expenditures (u) and (v) in para. 2 (e) of the compromise, namely, the donation of Rs. 50 to the Anjuman Hemayat Islam Monghyr and the scholarship to four Mahammadan students at the Begusarai English High School are outside the scope of the trust either in their nature or in their extent.

[23] I do not think that the statement in the compromise that the income of the *wakf* is calculated to be Rs. 5072-3-10½ is in any way discredited by the allegation in the plaint that it was about Rs. 9000. The five arbitrators clearly investigated the position with care. In any event all the alleged sources of income are included in the compromise and there is a proper and sufficient provision in para. 2 (f) thereof for the disposal of surplus income.

[24] Nor do I think that the fact that the allowance to the sajjadanashin is greater than that temporarily agreed upon in the scheme of management evolved more than a hundred years ago constitutes any breach of trust. I think that we can assume that the five arbitrators fixed a reasonable figure. It would be refreshing to think that the sajjadanashin (the appellant) was opposing the compromise because he thought it gave him too large an allowance, but I am afraid his motives are quite otherwise.

[25] In regard to the costs of this appeal, having regard to the discreditable history of this litigation, the negligent manner of appeal and the conclusion to which I have come as to the motive for the appeal, I think that the appellants must pay the respondent his costs thereof.

D.H. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 103** *[C. N. 39.]*

MEREDITH J.

*Sheobhajan Singh and others — Appellants* v. *Manik Chand Sahu and others — Respondents.*

Second Appeal No. 498 of 1945, Decided on 7-1-1947.

**Court-fees Act (1870), S. 7 (i) — Suit for possession and future mesne profits—Possession decreed but relief as to mesne profits refused — Appeal by defendant and cross-objection by plaintiff — Plaintiff cross-objector must value his claim for mesne profits from date of institution of suit till date of decree and pay *ad valorem* court-fee thereon — No court-fee is however payable on claim for mesne profits from date of decree to date of delivery of possession — Schedule 2, Art. 17 (vi) cannot apply —Court-fees Act, S. 11 and Sch. 2, Art. 17 (vi).**

A suit for possession and future mesne profits of certain property was dismissed by the trial Court but in appeal the claim for possession was decreed while the relief as to future mesne profits was refused. The defendant appealed from the decree for possession and the plaintiff filed a cross-objection on the ground that the lower appellate Court had erred in refusing the relief as to future mesne profits and that in any event it ought to have given a direction for ascertainment of mesne profits from date of institution of suit till the date of the decree for possession :

*Held* that the claim in the cross-objection in so far as it related to a fixed period namely from the date of the institution of the suit to the date of the decree for possession was no longer a claim in respect of future mesne profits but was a claim in respect of antecedent mesne profits and therefore the cross-objector must value that claim and pay *ad valorem* court-fees thereon. Schedule 2, Art. 17 (vi) had no application to such a case. [Para 5]

*Held further* that no court-fees were payable on the memorandum in regard to the period from the date of the decree up to the date of recovery of possession, which was wholly unknown, but should the cross objection succeed, then by analogy with S. 11 of the Act, court-fees will have to be paid later on the difference between the estimate to be now made and the total amount eventually decreed after ascertainment, if any. That payment will be a condition precedent to execution. [Para 5]

**Annotation** : ('44-Com.) Court-fees Act, S. 7 (i), N. 5, Pt. 7; S. 11, N. 8, Pt. 2.

*Harinandan Singh* — for Cross-objection.

*Government Advocate* — for the Crown.

**Meredith J.**—This is a reference under S. 5, Court-fees Act. The facts are very simple. A suit was brought for recovery of possession of certain property, and mesne profits were claimed from the date of the institution of the suit up to the date of the judgment and also for the future period up to the date of recovery of possession. In accordance with practice no court-fee was paid or claimed upon these future mesne profits. The suit was dismissed by the trial Court, but in the lower appellate Court the suit was decreed, except as regards the claim to mesne profits, which was rejected. The defendants came to this Court in second appeal, and the plaintiffs filed a cross-appeal against the refusal of the Court to decree mesne profits. This cross-objection was not valued or stamped at all, and the question which has been referred to me as Taxing Judge is what court-fee is payable, if any?

[2] The Stamp Reporter suggested that if it was not possible to estimate the subject-matter in dispute at a money value, Art. 17 (vi) of Sch. 2, Court-fees Act should be applied, and a court-fee of Rs. 18-12-0 paid. The taxing Officer, on the other hand, thinks that the cross-objectors should be asked to make an estimate of the amount of mesne profits for the period between

the institution of the suit and the date of the decree of the lower appellate Court, and should pay *ad valorem* court-fees thereon.

[3] In my opinion, the learned taxing officer has taken the correct view. It is true that when a plaintiff claims future mesne profits he is not required to make any estimate thereof, or pay any court-fee, the obvious reason being that as the duration of the litigation is unknown there is no possibility of making any estimate even approximate. The same principle will apply in appeal with regard to mesne profits which are still future in full sense, that is to say, for a period between the date of the decree appealed against and the eventual recovery of possession. But it will, in my judgment, not apply to mesne profits for the period between the institution of the suit and the decree. Here the analogy is, I think, with antecedent mesne profits. When a plaintiff claims mesne profits up to the date of the institution of his suit he is required to make an estimate of the probable amount and pay court-fees thereon, because he knows the land and its value and the period is also fixed. Under Art. 1 of Sch. 1, Court-fees Act, a memorandum of appeal has to bear a court-fee stamp calculated on the value of the subject-matter in dispute in the appeal. In the memorandum of cross objection, the present plaintiffs say that the Court below has erred in refusing to pass any decree for mesne profits, and that, in any event, the Court below ought to have given a direction for ascertainment of mesne profits from the date of the suit up to the date of the passing of the decree. The second part of this prayer clearly relates to a fixed period, and just as the plaintiffs have to make an estimate of antecedent mesne profits up to the date of the suit and pay court-fees thereon it seems to me that they must also estimate the mesne profits up to the date of the decree which forms the subject-matter of their cross-appeal, and must pay court-fees thereon. There is no force in the contention that an estimate cannot be made. It can be made just as easily as an estimate of antecedent mesne profits, and indeed in a sense the claim in the cross-appeal has become a claim for antecedent mesne profits in so far as it asks for them up to a fixed date, which is now a date in the past, namely, the date of the decree. There is no longer anything future about that portion of the claim.

[4] A number of rulings has been cited before me but none of them is directly in point and it is, therefore, unnecessary to refer to them.

[5] I hold, therefore, that the cross-objectors must value their claim in so far as it relates to mesne profits for the period between the institution of the suit and the date of the decree appealed against, and must pay *ad valorem* court-fees thereon. Article 17 (vi) of Sch. 2 has no application. No court-fees are payable on the memorandum in regard to the period from the date of the decree upto the date of recovery of possession, which is wholly unknown, but should the cross-objection succeed, then by analogy with S. 11 of the Act, court-fees will have to be paid later on the difference between the estimate to be now made and the total amount eventually decreed after ascertainment, if any. That payment will be a condition precedent to execution. That is my answer to the reference.

K.S. *Answer accordingly.*

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**A. I. R. (35) 1948 Patna 104** *[C. N. 40.]*

RAY J.

*Lachmi Kant Deo Prasad Singh — Appellant* v. *Rameshwar Chaudhury and others— Respondents.*

Appeal No. 802 of 1945, Decided on 23rd December 1946, from appellate decree of Addl. Sub-Judge, Darbhanga, D/- 23rd February 1945.

**(a) Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), S. 7 — Some of certificate-debtors dead at time of service of notice — Fresh notice, if necessary.**

Where some of the certificate-debtors (recorded proprietors) against whom a certificate under S. 4 was filed were found to be dead at the time of the service of notice under S. 7, a fresh notice under S. 7 need not be issued against all the certificate-debtors but only on the legal representatives of the deceased and in default of such notice the interest of the deceased in the property sold will not be affected. [Para 3]

**(b) Civil P. C. (1908), S. 100—New point — Point that sale for arrears of cess was without jurisdiction as no certificate as required by S. 4, Bihar and Orissa Public Demands Recovery Act had been filed cannot be raised for first time in second appeal —Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), Ss. 4, 45.** [Para 5]

**Annotation : ('44-Com.) Civil P. C., S. 100 N. 55 Pts. 17, 48.**

**(c) Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), S. 7 — Copy of certificate — What is—Failure to serve copy—Effect of.**

Where there is simply service of notice in the prescribed form No. 3 printed at page 57 of the Bihar Certificate Manual, 1937 but no copy of the certificate is served as required by S. 7 it will be a case of non-compliance with the imperative and the certificate-debtor will be entitled to recover possession of his property or to set aside the sale under S. 45 of the Act. [Para 7]

A document which contains tabular statement of the necessary information to be incorporated in the certificate but does not contain the certificate of the Certificate-Officer certifying the correctness of the demand as required in form No. 1 printed at page 55 of the Bihar Certificate Manual, 1937 is neither a certificate nor a copy of the certificate and the service of such a document on the certificate-debtor is not a service of the copy of the certificate within the meaning of S. 7 : 23 Cal. 775 (P. C.), *Rel. on.* [Para 7]

Mere knowledge of the certificate on the part of the certificate-debtor cannot take the place of service on him : 201 L. T. 84, *Rel. on.* [Para 8]

**(d) Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), S. 7—Service of notice—Proof.**

**Where the handwriting of the serving peon on the notice as regards service is proved by another peon, who was neither attestor to nor had any knowledge of the service, even though the serving peon was alive and in service of the Court, the document is technically speaking proved and can be admitted into evidence but the other party is deprived of the opportunity of cross-examining the serving peon with regard to the manner of service as reported by him.** [Para 9]

**(e) Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), S. 7 — Service of notice — Burden of proof.**

**In a suit by the certificate-debtor to set aside a sale the initial onus that lies on the certificate debtor is to deny the service of notice under S. 7. When that has been done, it is for the defendant the certificate-holder or auction-purchaser, whoever he may be, to prove that the notice was served in accordance with law.** [Para 9]

**(f) Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), S. 7—Notice—Service on patwari of certificate-debtor, if sufficient.**

**The rules under the Act require that service of notice under S. 7 should be effected personally on the certificate debtor or on his agent duly authorised to accept notice on his behalf. Where service was effected on the patwari of the certificate debtor but there is nothing to show that he was empowered duly to receive the notice on behalf of the certificate-debtor the service of notice is defective and the notice cannot be said to have been served in substantial compliance with law.**

[Paras 9 and 10]

**(g) Bihar and Orissa Public Demands Recovery Act (4 [IV] of 1914), S. 45—Suit to set aside certificate sale—Necessary parties.**

**In a suit by the certificate-debtor to set aside a certificate sale held under the Act and for recovery of possession from the auction-purchaser the Province of Bihar is not a necessary party : 14 C. W. N. 606 ; 10 A. I. R. 1923 Mad. 58 and 14 A. I. R. 1927 Lah. 631, *Rel. on* ; 30 A. I. R. 1943 Cal. 114, *Expl.*** [Para 12]

*Cases referred* :—

1. ('96) 23 Cal. 775 : 23 I. A. 45 : 7 Sar. 1 (P.C.), Baijnath Sahai v. Ramgut Singh.
2. Vol. 201 L. T. 84, Gondar v. Gondon.
3. ('43) I. L. R. (1943) 1 Cal. 22 : 30 A.I.R. 1943 Cal. 114 : 205 I. C. 523, Gaibandha Loan Office Ltd. v. Mt. Saiyadunnessa Khatun.
4. ('23) 10 A. I. R. 1923 Mad. 58 : 70 I. C. 168, Subbaraya Mudaliar v. Kanasamy Mudaly.
5. ('27) 14 A. I. R. 1927 Lah. 631 : 9 Lah. 167 : 103 I. C. 763 Tulsi Das v. Shiv Dat.
6. ('10) 14 C. W. N. 606 : 5 I. C. 341, Raghuraj Singh v. Maharaj Lal.

*B.N. Rai, Girjanandan Prasad and B.K. Sharma* — for Appellant.

*L. K. Jha, M. N. Pal and P. Jha* — for Respondents.

**Judgment.**—This appeal arises out of a suit for setting aside a certificate sale under the Public Demands Recovery Act and for recovery of possession. The property affected by the suit is Touzi No. 16396 with an area of 22 bighas which was sold for a sum of Rs. 85. The sale was held on 28th March 1940 for arrears of cess for which a certificate is purported to have been filed under S. 4 of the Act (Bihar and Orissa Act 4 [IV] of 1914). The plaintiff had made certain allegations against the purchaser by way of impugning his purchase as a farzi transaction for the benefit of defendants third party. Defendants second party were some of the cosharers of the plaintiff. The certificate is purported to have been filed against some of the recorded proprietors but not all. Matters that were specifically put in issue were, (1) whether there was service of notice in accordance with S. 7 of the Act, (2) whether the suit was barred by the provisions of S. 43 of the Act and (3) whether the suit was bad for non-joinder of the Province of Bihar — the certificate-holder. There was an issue also as to if the sale was fraudulent and collusive. Defendant 1 pleaded that the certificate proceedings were not defective in any way and there was due service of notice as prescribed by S. 7 of the Act, and the sale was perfectly valid.

[2] The trial Court held that the Government of Bihar was a necessary party and therefore there was defect in the frame of the suit. With regard to the service of notice under S. 7 of the Act he came to a finding that the notice had in fact been served. He, however, decreed the plaintiff s suit holding that the entire proceedings were without jurisdiction inasmuch as some of the certificate-debtors having been found dead at the time of service of notice under S. 7, a fresh notice under S. 7 was required to be issued and as the same was never issued, the sale and other proceedings following were without jurisdiction. He summarised his findings in these words :

"In my opinion, therefore, when the sale had been found to be void *ab initio*, the suit cannot fail because a necessary party has not been joined."

[3] The learned lower appellate Court, however, reversed the decision of the learned Munsif finding that the suit was not maintainable as the Province of Bihar, a necessary party to the suit, had not been impleaded, and, secondly, he rightly disagreed with the view of the trial Court that on the death of some of the certificate-debtors, a fresh notice under S. 7 has to be issued against all the certificate-debtors, or else the proceedings would be without jurisdiction. His view was, with which I entirely agree, that in case of death of any of the certificate-debtors, it is only necessary to serve a fresh notice on his legal representatives, and, in default thereof, his interest in the property sold will not be affected. This position is clear from the provisions of S. 52 of the Act which provides :

"Where a certificate-debtor dies before the certificate has been fully satisfied, the certificate-officer may, after serving upon the legal representative of the deceased a notice in the prescribed form, proceed to execute the certificate against such legal representative ; and the provisions of this Act shall apply as if such legal repre-

sentative were the certificate-debtor and as if such notice were a notice under S. 7."

[4] On the learned lower appellate Court's reversal of the decree of the trial Court, the plaintiff has preferred this second appeal. The plaintiff's contentions in this Court are : (1) that no certificate of the public demands in arrear has been filed as required under S. 4 of the Act and in such circumstances the entire proceeding culminating in the sale in question must be vitiated as without jurisdiction; (2) that in any view of the case, the service of notice under S. 7 of the Act which is equally imperative in order to give the certificate-officer jurisdiction to attach and sell a citizen's property has not been served in accordance with law. The respondents' learned counsel urges that the suit is not maintainable in the absence of the Province of Bihar as a party defendant inasmuch as he is a necessary party. I will address myself to all these contentions in the order in which I have mentioned.

[5] With regard to the first contention reliance has been placed upon a decision of the Judicial Committee of the Privy Council in the case in 23 Cal. 775.[1] The dictum laid down in the case does no doubt support this contention of the appellant's learned counsel, but, however, the appellant will not be allowed to raise this contention in second appeal, inasmuch as he did not raise it in either of the Courts below. On the contrary, he had said in his plaint that on account of collusion of some of the defendants as cosharers the touzi fell in arrears with the result that a certificate was issued. The learned counsel contends that the word 'certificate' in the plaint has been used rather loosely, and what was referred to therein was the notice under S. 7, but not a certificate prescribed to be filed under S. 4. It may be so, but at the same time as the matter was not put in issue, the defendant was prevented from adducing evidence to show that in fact a certificate was filed according to law. In the circumstances, I cannot give an indulgence to the plaintiff at the cost of the defendant by allowing him to raise the plea for the first time in second appeal. I need not, therefore, consider the contention on its merit.

[6] I then proceed to consider his second contention, namely, non-service of notice under S. 7. It may be noted that this contention does not involve a question of fraud in the shape of fraudulent suppression of the notice; it is only a contention based upon mere non-service. In order to understand this argument, I have to place before me S. 7 of the Act which reads as follows:

"When a certificate has been filed in the office of a Certificate-Officer under S. 4 or S. 6, he shall cause to be served upon the certificate-debtor, in the prescribed manner, a notice in the prescribed form and a copy of the certificate."

It becomes then necessary to refer to the form in which a certificate is prepared and filed. It is Form No. 1 at page 55 of the Bihar Certificate Manual, 1937, and the form requires certain informations to be recorded in the certificate, namely, the number of certificate, name and address of certificate-holder, name and address of certificate-debtor, amount of public demand and further particulars. Besides these informations, there should be appended to them at the foot, a certificate in these terms :

"I hereby certify that the above mentioned sum of Rs. . . . . is due to the abovenamed . . . . . from the abovenamed. . . . . ."

In case where the certificate is signed on requisition sent under S. 5, there should be a further certificate to the effect that not only that the above mentioned sum is justly recoverable but that its recovery by a suit is not barred by law. In the present case as the certificate is under S. 4 of the Act, the last-mentioned endorsement by the certificate officer is not necessary. Reading the form of the certificate as a whole, it no doubt takes the place of a decree for recovery of dues from the certificate-debtor. No less an important part has to be assigned to the endorsement to be appended at the foot of the table of informations in the form, because it is that endorsement which gives it the character of a decree. Bereft of this endorsement it will simply be a tabular account there being nothing on the face of it to vouchsafe its correctness and its enforceability. In the circumstances, if it were a case, as it seems to be in the present case, in which a document purporting to be a certificate contained a tabular statement of informations but not the certificate, I will have no hesitation in holding that it will be considered to be a certificate proceeding without a certificate.

[7] In this view of the matter, I shall consider whether there has been a service of notice in accordance with S. 7 of the Act. The section, which has already been quoted, makes it abundantly clear that a copy of the certificate will be served upon the certificate-debtor, besides a notice in the prescribed form, which form is printed at page 57 of the Manual. If in any particular case, there is simply service of a notice in the prescribed Form No. 3, but no copy of the certificate is served, it will be a case of non-compliance with the imperative, the certificate-debtor will be entitled to recover possession of the property or to set aside the sale under the provisions of S. 45 of the Act. The notice purporting to be a notice under S. 7 with the service report is on record. I had it read out to me, and I find that on a single sheet of paper there were at first tabular statements giving the informations neces-

sary to be incorporated in the certificate, but there is no certificate of the certificate-officer certifying the correctness of the demand as required in FORM NO. 1 printed at page 55. Below the tabular statement, notice in FORM NO. 3 appears. In the circumstances I am constrained to hold that there might have been service of notice but there was no copy of certificate served.

[8] It has been strenuously argued by Mr. Jha that all the informations that are necessary to be conveyed to the certificate-debtor, namely, the name of the certificate-holder, the name of the certificate-debtor, the amount due and the property in respect of which it is due, being there, it shall be held that that amounts to sufficient compliance with the provisions, in other words it should be held that notice was served on the certificate-debtor with a copy of the certificate. He further urges that to hold otherwise would amount to giving preference to mere technicality and form over substance. The argument, though at first sight sounds attractive, does not carry conviction in view of the observations of their Lordships of the Judicial Committee in 23 Cal. 775.[1] Their Lordships have laid down that for this extraordinary procedure of investing a revenue officer with the power of selling a subject's property certain forms have been laid down to be followed and conformed and that in such proceedings those forms are also matters of substance. They have also said that a certificate is an *ex parte* decree as it is filed behind the back of the certificate-debtor, and the certificate-debtor's right to impugn the validity and correctness of the demand is reserved to a stage to come after service of notice under S. 7, and unless you give the certificate-debtor a notice with the copy of the decree, he is in fact invited to take exception to the validity or correctness of the demand. Therefore, even though it has the appearance of a mere technicality or a form, it has the value of substance, and I, therefore, hold that in this case copy of the certificate was not served. Mere knowledge of an order could not take the place of its service : *see* 201 L. T. 84.[2]

[9] Secondly, with regard to the service of notice, the only evidence that is on record is formal proof of the peon's report. The serving peon, though alive and still in service of the Collector, has not been examined. Another peon has been examined who was neither an attestor to the service nor had, otherwise, any knowledge of service. He simply proved the handwriting of the serving peon and the document was admitted into evidence. Technically speaking, it can be said that the document has been properly proved and, therefore, has been rightly admitted into evidence, but the certificate-debtor, namely the plaintiff, is deprived of cross-examining the serving peon with regard to the manner of service as reported by him. Secondly, the service appears to have been effected on one Pun Pun Jha representing himself to be a patwari of the certificate-debtor. The rules require that the service should be effected personally on the certificate-debtor or on his agent duly authorised to accept notice on his behalf. Of course, there is a further procedure applicable to cases in which personal service either on the certificate-debtor or on his agent cannot be effected but as the present is not a case of that kind, I need not address myself to those alternative provisions. The learned lower appellate Court has said that the plaintiff should have examined Pun Pun Jha to deny the service, but in considering whether the service has been proved in the manner prescribed in law, the question of onus acquires some amount of importance. The onus has always been held to lie on either the certificate-holder or the auction-purchaser whoever he may be. The initial onus that lies on the certificate-debtor is to deny the receipt of the notice and that has been done. In the circumstances the defendants should have proved that the notice has been served in accordance with law.

[10] Assuming that actual service has been proved to have been effected on one Pun Pun Jha and assuming that Pun Pun Jha as reported in the peon's report was at the time a patwari of the certificate-debtor, there is nothing to show that he was empowered duly to receive notice on behalf of the certificate-debtor, his alleged master. In the circumstances I hold that the learned lower appellate Court's finding that the notice had been served in substantial compliance of law cannot be upheld. The service of notice, in my judgment, is defective in two ways: (1) that it is not accompanied with a copy of the certificate and hence there has been no service of the copy of certificate and (2) that it has not been served on the certificate-debtor's agent who was empowered to receive the notice on his behalf. The appellant, therefore, has succeeded in establishing both of his contentions on which he is entitled to have the sale set aside provided his suit is maintainable in the absence of the Province of Bihar as a party defendant.

[11] In support of his last contention, Mr. Jha cited a very recent decision of the Calcutta High Court in the case in I. L. R. (1943) 1 Cal. 22.[3] In that case in which the certificate-debtor had brought a suit for setting aside the certificate sale, his suit was objected to by the defendant as barred by limitation and if it were found that the plaintiff was entitled to compute the period that was necessary to serve the Secretary of State with notice under S. 80, Civil P. C., he

should be in time. In such circumstances it was held by their Lordships of the Calcutta High Court that the Secretary of State was a necessary party and the period required to serve a notice under S. 80, Civil P. C., should be added to the period of limitation provided in the Act. In coming to this conclusion, their Lordships were influenced very greatly by the proviso to S. 25, Public Demands Recovery Act of Bengal. They said:

"There are two alternative but mutually exclusive procedures provided for in the Public Demands Recovery Act of 1913 to set aside a certificate sale on the ground of non-service of the notice issued under S. 7 of that Act. One is by an application to the certificate officer (S. 23) and the other by suit in a civil Court (S. 36). Where the first method is adopted by the certificate-debtor his application must be heard with notice to both the auction-purchaser and the certificate-holder (proviso to S. 25). We do not see why both of them should not be necessary parties, defendants, in a suit under S. 36, where the same relief is asked for and on the same ground."

[12] In the Bihar Act, however, the corresponding provision is couched in different language, the language being "persons affected thereby." In the circumstances the necessity of impleading the Secretary of State or for the matter of that the Province of Bihar depends upon whether he is affected in any way by the relief that is sought in the suit. The relief sought is to recover the property from the auction-purchaser after having the sale set aside or having it declared that the sale is not binding against him. I fail to see any reason why the Province of Bihar is at all interested in any one of these reliefs. As observed in the Calcutta case just referred to, the Province may be affected in the way that it will have to start a fresh execution proceeding, and will have to undergo some expenditure and trouble. Having that in view, if the plaintiff is not held entitled to any such relief as will put the Province to disadvantage, there will be absolutely no reason to throw away the suit on the mere ground that the Province of Bihar is not impleaded as a party. Parallel cases can be cited to show that the Province is not a necessary party. Two cases have been cited before me by the learned counsel for the appellant to show that in suits for setting aside auction sales held under the Code of Civil Procedure by one whose claim under O. 21, R. 58 has been rejected, the decree-holder is not a necessary party. They are: A. I. R. 1923 Mad. 58[4] and A. I. R. 1927 Lah. 631.[5] Besides he has cited another case directly in point of the Calcutta High Court in which in a suit for recovery of possession on the declaration that the certificate sale was void *ab initio*, it was held that the Secretary of State is not a necessary party. The decision is reported in 14 C. W. N. 606.[6] I should, therefore, hold that there is no defect in the frame of the suit in the absence of the Province of Bihar as a party defendant.

[13] I should, however, in allowing the appeal condition my order in a manner so as to ensure that no prejudice is caused to the Province of Bihar. In that event, it will be a suit by the result of which the Province does not stand affected, and its non-joinder is of no consequence. I should, therefore, set aside the judgment of the learned lower appellate Court and hold that the plaintiff is entitled to get possession of his properties from the auction-purchaser under the certificate sale which will not be held binding against him, but he must pay the entire dues due to the Province of Bihar as arrears of cess plus costs of the execution that was borne by them. This amount must be deposited in the trial Court within two months from today in default of which his suit will stand dismissed. In the circumstances of this case, I make no order as to costs.

G.N. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 108** *[C. N. 41.]*

SHEARER AND SINHA JJ.

*Mansur Ali and another* — *Petitioners* v. *Emperor.*

**Criminal Revn. Nos. 287 and 288 of 1946, Decided on 21-4-1947, from order of Sessions Judge, Cuttack, D/- 18-10-1946.**

**Defence of India Rules (1939), Rr. 81 (4) and 121 —Provincial Government Notification No. 11693-ST, dated 23-12-1943—"Cloth"—Meaning of — Ready-made garments despatched from Post Office — Notification, if contravened.**

**The word "cloth" not having been defined in the Provincial Government Notification No. 11693-ST, dated 23-12-43 must be understood in its ordinary dictionary meaning of excluding ready-made garments. Moreover, the Cotton Cloth and Yarn (Transmission by Post) Prohibition Order. 1944, which was promulgated by the Central Government, excludes ready-made garments from the definition of "cloth" and that definition may be utilised for purposes of the Provincial Notification and the word understood in the same sense. Therefore, a person despatching parcels of ready-made garments from a Post Office. before the promulgation by the Provincial Government of an Order relating to ready-made garments does not, contravene the Notification and cannot be convicted under R. 81 (4)/121.**

**[Paras 5 and 6]**

*K. Patnaik* — for Petitioners.
*Advocate-General* — for the Crown.

**Sinha J.**— These two applications in revision arise out of the judgment of the learned Sessions Judge of Cuttack confirming the orders of the Magistrate, First Class of the same place convicting the petitioner in each case under R. 81 (4)/121 of the Defence of India Rules, and sentencing him to pay a fine of Rs. 100, and, in default, to undergo rigorous imprisonment for one month. In each case there was a further order of confiscation of the property seized.

[2] The facts of this case lie within a narrow compass, and are not in dispute. Petitioner, Mansur Ali in the one case and Sheikh Abdulla in the other despatched several parcels from the Cuttack Post Office, the destination in each case being Howrah. The parcels were seized, and were found to contain a large number of *sayas* (women's underskirts). The petitioners were prosecuted on the charge of having contravened the Provincial Government's Notification No. 11693-ST., dated 23-12-1943, which runs as follows:

"In exercise of the powers conferred by sub-r. (2) of R. 81 of the Defence of India Rules, the Governor of Orissa is pleased to order that no cotton cloth as defined in the Schedule annexed to this notification shall be transported by rail, road, water or air or in any other manner from any place in Orissa to any place outside the Province except under and in accordance with the terms of a permit granted by the Controller of Supply and Transport, Orissa or any Officer authorised by him in this behalf.

SCHEDULE

'Cotton cloth' means and includes cloth manufactured either wholly or partly from cotton, but does not include cloth manufactured wholly from wool, silk, artificial silk or jute."

[3] The accused in each case did not deny the fact of having despatched the parcels from the Cuttack Post Office, but contended that no offence had been committed, as they had not transported "cloth" but ready-made garments which were not within the mischief of the notification aforesaid.

[4] Both the Courts below have taken the view that the accused in each case is guilty of an attempt to contravene the provisions of the notification, and, in that view of the matter, convicted and sentenced the petitioners as stated above.

[5] Mr. Patnaik, who appeared on behalf of the petitioner in both the cases, has contended, and, in my opinion, rightly, that, the word "cloth" not having been defined in the notification must be understood in its ordinary dictionary meaning of excluding ready-made garments. The schedule to the notification contains definition of "cotton cloth"; it has not attempted any definition of "cloth". The learned Advocate-General contended that, as the garments in question are all made of cotton cloth, they are within the mischief of the notification. But, in my opinion, simply because the garments are made of cotton cloth, it does not follow as a necessary legal corollary that they are "cloth", The Oxford Dictionary, vol. 2, has given an elaborate meaning in its different senses of the word "cloth", which may support either point of view. It gives the following significant meaning of the word "cloth" as used in modern English:

"As a singular cloth is not now used in the sense of 'a garment', and has received a new plural *cloths* for its extant sense, *clothes* remains a collective plural, without a singular; to express the latter, a phrase, such as article of clothing,' or another word, such as 'garment' is used."

It will, therefore, appear that, though in the 19th century or earlier the usage of this word may have included the sense of a garment also, in the 20th century the term "cloth" is not used in the sense of a garment but in the sense of the material used for making garments. Hence, in my opinion, the contention raised on behalf of the petitioners that ready-made garments are not within the meaning of the notification of the Provincial Government, referred to above, is well founded. Mr. Patnaik also pointed out that the Central Government used the word "cloth" in the sense contended for by him, appears from the following definition of "cloth" in the Cotton Cloth and Yarn (Transmission by Post) Prohibition Order, 1944:

" 'cloth' means any kind of cloth manufactured either wholly or partly from cotton, but does not include cloth made up into garments."

He, therefore, contended that, in the absence of a special definition of "cloth" in the Provincial Order said to have been contravened by the petitioners, the definition given by the Central Order, as quoted above, should be deemed to apply to the present case, or, at any rate, the public should not be held liable for any penalty for construing the word "cloth" in that sense. The learned Advocate-General, in answer to this contention, submitted that the meaning of "cloth" as contained in the Central Order referred to above is for the purposes of that particular Order, and not for all purposes. But it may be said for the petitioners, as has been contended by Mr. Patnaik, that, where there are two parallel Orders, one by the Provincial Government and the other by the Central Government, relating to the same subject-matter, in the absence of any definition of "cloth" in the Provincial Order, the definition of the word in the Central Order may be utilised for purposes of both the Orders and the word understood in the same sense, unless a contrary intention is apparent from the words used in the Provincial Order. The Central Government promulgated the Cotton Cloth and Yarn (Transmission by Post) Prohibition Order, 1946, in which it is provided that

"'cloth' means any kind of cloth manufactured either wholly or partly from cotton and includes garments or other articles of personal or domestic use (other than used or old garments) made wholly or principally from cloth"

This Central Order was republished in the Orissa Gazette, dated 15-11-1946. The alleged offences in this case are said to have been committed on 22nd and 23rd March 1946. The Provincial Government also promulgated an Order relating to ready-made garments, which was published in the Orissa Gazette on 11-6-1946,

making it clear that the penalty attached even to transmission of ready-made garments. Mr. Patnaik for the petitioners contended that these later orders would show that the orders said to have been infringed in the present case were not intended to punish the transmission of ready-made garments. On the other hand, the learned Advocate-General contended that the later Orders of the Provincial Government only made the meaning more clear and unequivocal by providing that ready-made garments were also within the mischief of the penalty. In my opinion, the words used in the Orders of the Provincial Government, dated 23-12-1943, are not so explicit as necessarily to include ready-made garments as coming within the meaning of the prohibition. If there is any doubt about the interpretation of the words creating the offence, the benefit of the doubt must go to the accused.

[6] In view of these considerations, it must be held that the petitioners have not committed any offence punishable under R. 81 (4) read with R. 121 of the Defence of India Rules. The orders passed by the Courts below, therefore, must be set aside, and the petitioners acquitted. It follows that the orders of confiscation also must be set aside. The rules are accordingly made absolute.

**Shearer J.**—I agree.

V.R. *Rules made absolute.*

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## A. I. R. (35) 1948 Patna 110 *[C. N. 42.]*

SHEARER AND SINHA JJ.

*Narsing Das Modi*—*Petitioner* v *Emperor.*

Criminal Revn. No. 222 of 1946, Decided on 2-5-1947, from order of Sessions Judge, Cuttack, D/-18-7-1946.

**Cotton Cloth and Yarn (Control) Order (1943), S. 12 – Liability of cloth merchant for sale by his salesman at price in excess of controlled price in his absence.**

Where cloth is sold at a price in excess of the controlled price, it is actually handed over to the customer and the money for it is received not by the cloth merchant but by his salesman in his absence from the shop, in law and in fact, the sale is actually made by the merchant himself and he is criminally liable : 32 A. I R. 1945 All. 90, *Rel. on*; 33 A. I. R. 1946 Pat. 30, *Distng.* [Para 3]

*Cases referred* :—

1. ('45) 32 A. I. R. 1945 All. 90 : I. L. R. (1945) All. 540 : 219 I. C. 87:46 Cr. L. J. 472, Harish Chandra v. Emperor.
2. ('46) 33 A. I. R. 1946 Pat. 30 : 224 I. C. 131 : 47 Cr. L. J. 568, Ram Narain Kedia v. Emperor.

*P. C. Chatterji*—for Petitioner.

*Advocate General*—for the Crown.

**Shearer J.**—The petitioner, Narsing Das Modi, is a cloth merchant of Cuttack and has been convicted for having sold small quantities of cloth to each of two customers at a price in excess of the controlled price. It is admitted that the cloth in question was actually handed over to the customers and the money for it received, not by the petitioner but by a salesman of his, one Kanhaya Lal. It is also admitted that on 4-7-1944, when the sales took place, the petitioner was not in his shop, and, indeed, was not in Cuttack and had not been in Cuttack for some time previously. It is contended that on this ground the conviction was wrong and must be set aside. In Halsbury's Laws of England, Edn. 2, Vol. 9, para. 4 p. 12, it is stated :

"The condition of mind of a servant or agent is not imputed to the master or principal so as to make him criminally liable. A master is not criminally liable merely because his servant or agent commits a negligent or malicious or fraudulent act. But in the limited class of cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of a servant or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders."

[2] Section 12, Cotton Cloth and Yarn (Control) Order, 1943, states :

"No manufacturer or dealer shall sell or offer to sell any cloth or yarn at a price higher than the maximum price specified in this behalf under clause 10."

[3] The word "dealer" which occurs there means

"a person carrying on the business of selling cloth or yarn or both, whether wholesale or retail, and whether or not in conjunction with any other business."

It is quite clear, therefore, that, in law and in fact, although the cloth was handed over to the customers and the money was received by a salesman Kanhaya Lal, the sales were actually made by the petitioner whose servant Kanhaya Lal was. It is also quite clear that it was not incumbent on the prosecution to show that either the petitioner or Kanhaya Lal knew that the price which was charged for the cloth was in excess of the controlled price. The point raised by the learned advocate for the petitioner was considered by Malik J. of the Allahabad High Court in A. I. R. 1945 ALL. 90.[1] That learned Judge in a most exhaustive judgment reviewed all the authorities bearing on the point and came to the conclusion that, where a salesman employed by a cloth merchant had sold cloth at a price in excess of the controlled price, the cloth merchant or dealer is criminally liable. I respectfully agree with the decision and, in general, with the reasoning by which it was supported. On behalf of the petitioner, reliance was placed on the decision of Beevor J. in A. I. R. 1946 Pat. 30.[2] In that case two partners of a firm of cloth merchants were tried and convicted on a charge of having been in possession of certain

cloth which did not bear the requisite marks or stamps. One of the partners was in the shop when the cloth was seized; the other apparently was not and apparently also there was no evidence to show that he had been aware of the existence of the cloth. The conviction of the latter was, on this ground, set aside by Beevor J. This case can, however, I think, quite easily be distinguished. When a firm consists of several partners, each one of the partners may no doubt be regarded as an agent of the firm. Strictly speaking, however, it was impossible to say in the case which Beevor J. had to deal with that the relationship of principal and agent subsisted as between the partner who was in charge of the shop and the other partner who quite possibly was merely a sleeping partner. In other words, the maxim *respondeat superior* which applies in this case had clearly no application in that case. The petitioner was, in my opinion, rightly convicted, and I would accordingly dismiss this application.

**Sinha J.**—I agree.

D.H. *Application dismissed.*

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**A. I. R. (35) 1948 Patna 111** *[C. N. 43.]*

RAY J.

*Sarat Chandra Ghose—Appellant* v. *Chintamani Behera and others — Respondents.*

Appeal No. 49 of 1943, Decided on 11-11-1946, from appellate decree of Dist. Judge, Cuttack, D/- 21-12-1942.

**(a) Transfer of Property Act (1882), S. 52 — Applicability to court sale.**

The principle of *lis pendens* applies as well to private transfers as to transfers in execution of decrees in court auction. [Para 3]

Annotation: ('45-Com.) T. P. Act, S. 52 N. 31 Pt. 2.

**(b) Transfer of Property Act (1882), S. 52 — "Transferred or otherwise dealt with"— Institution of suit during pendency of a suit.**

The rule of *lis pendens* applies to transfers during the pendency of a suit relating to immovable property and not to suits relating to the same property instituted during the pendency thereof. [Para 3]

Annotation : ('45-Com.) T. P. Act, S. 52, Note 27.

**(c) Civil P. C. (1908), O. 34, R. 1— Suits by prior and subsequent mortgages without impleading each other — Sale in execution of decree on prior mortgage during pendency of suit on subsequent mortgage—Rights of the parties — Transfer of Property Act (1882), S. 52.**

*A* executed a simple mortgage in favour of *B* in 1930. He executed a second mortgage by conditional sale in 1933 in favour of *C*. In 1936 *B* brought a suit on his mortgage without impleading *C* and obtained a decree. Subsequently *C* brought a suit on his mortgage without impleading *B* in 1938. During the pendency of this suit the mortgaged property was sold to one *D* on 15-8-1938 in execution of *B*'s decree. *C* obtained a preliminary decree on 10-5-1938 which was made absolute on 7-8-1939; but before this *D* had obtained possession through Court. In a suit for declaration of title and possession by *C*:

*Held* (1) that *B* was not a necessary party to *C*'s suit. [Para 1]

(2) that *D*'s purchase being during the pendency of the suit on *C*'s mortgage he was bound by the final decree in *C*'s mortgage and could not say that *C*'s mortgage suit should be tried afresh in his presence. [Para 3]

(3) that *C* was the owner of the mortgaged property in his right as a subsequent mortgagee against whom all rights of redemption had been lost by the parties concerned. *D*, however, had a different position, namely, that of a subrogee of the prior mortgage *C* would thus be entitled to redeem *D* who thereupon on his part would be called upon to redeem *C* not only by paying up his dues under the second mortgage but also by paying up what he paid to *D* by way of redeeming the prior mortgage because in the happening of that event he became the subrogee to the position of the prior mortgagee again : 18 A. I. R. 1931 All. 466 (F.B.), *Rel. on.* [Para 6]

Annotation: ('44-Com.) C. P. C., O. 34, R. 1 Note 19 Pt. 40.

*Case referred* :—

1. ('31) 18 A. I. R. 1931 All. 466 : 53 All. 1023 : 134 I.C. 1 (F.B.), Ram Sanehi Lal v. Janki Prasad.

*S. N. Sengupta and S. C. Palit* — for Appellant.

*S. K. De, D. Misra and D. Mahanty* — for Respondents.

**Judgment.** — The disputed properties originally belonged to defendant 3 to be hereinafter referred to as the mortgagor. He in consideration of a loan gave a simple mortgage of the properties to defendant 2 on 19-10-1930. The mortgagor gave a second mortgage by conditional sale to the plaintiff on 9-6-1933. In the year 1936, the first mortgagee brought a suit No. 166 for enforcement of his mortgage and if need be, for sale of the mortgaged properties. He, however, did not implead the second mortgagee. He obtained a mortgage-decree on 28-8-1936, and in execution thereof the mortgaged properties were sold to an outsider, that is, defendant 1 of this suit on 15-8-1938. By the time this auction-purchase was made, a suit for enforcement of the second mortgage was pending it being original suit No. 9 of 1938 in which a preliminary decree was obtained on 10-5-1938. The prior mortgagee not being a necessary party to the mortgage suit on the foot of a puisne mortgage, the question of his being impleaded as a party does not arise for consideration at all. The second mortgagee obtained a preliminary decree which was made absolute on 7-8-1939. About five months before that, defendant 1 had obtained possession through Court. In this state of facts the plaintiff has brought the present suit for declaration of his title, and recovery of possession on fulfilment of such conditions as he may be directed to do in view of the relative rights and liabilities between the parties.

[2] The learned Courts below have dismissed the plaintiff's suit on the ground that he has not been able to prove the second mortgage bond in a manner prescribed by law.

[3] The very simple question that should have set at naught all the complexities raised by the Courts below has unfortunately been completely overlooked. The position is that defendant 1's purchase dated 15-8-1938, was during the pendency of the *lis* on the foot of the second mortgage He, therefore, as an auction-purchaser is hit by the rule of *lis pendens* which amounts to saying that he is bound by the final decree secured by the second mortgagee who is the present plaintiff. Defendant 1, therefore, cannot be heard to say that the very basis of the decree has to be undone and the mortgage suit has to be tried afresh in his presence. Section 52, T. P. Act, defines the doctrine of *lis pendens* and it has been authoritatively pronounced, time and again, that the principle of *lis pendens* applies as well to private transfers as to transfers in execution of decrees in court auction. Mr. De invited my attention to a Full Bench decision of the Allahabad High Court in A.I.R. 1931 ALL. 466[1] in order to support his contention that the plaintiff's claim of title to the disputed properties by enforcement of his mortgage by conditional sale is hit by the rule of *lis pendens* having been acquired or completed during the pendency of the suit by the prior mortgagee. I find no support for such a proposition in the Full Bench decision for the simple reason that no *lis* on the foot of the first mortgage was pending after 15-8-1938, when the mortgage-decree obtained by the first mortgagee was satisfied. According to the explanation appended to S. 52 *lis* comes to an end as soon as the decree relating to an immovable property is exhausted. Secondly, the rule of *lis pendens* applies to transfers during the pendency of a suit relating to immovable property and not to suits relating to the same property instituted during the pendency thereof.

[4] This authority, however, makes the present position clear, namely, that defendant 1's purchase is hit by the rule of *lis pendens*. The passage which contains enunciation of this principle occurs at p. 480, col. 1 of the report. The passage reads :

"The third principle is that the language of S. 52 has been held to be applicable not only to private transfers but also to court sales held in execution of decrees. Section 2 (d) does not make S. 52 inapplicable to Ch. 4 which deals with mortgages. This is now well settled. Similarly if while a suit of a subsequent mortgagee for the enforcement of his mortgage against the mortgagor, without impleading the prior mortgagees, is pending, any attempt on the part of the prior mortgagee to get that interest sold in his own decree would be equally governed by S. 52."

[5] Under the circumstances, it would be futile to contend that, as against defendant 1 whose purchase is hit by the rule of *lis pendens* on account of the subsequent mortgage suit pending at the time of his purchase, the plaintiff will have to re-open the mortgage suit and establish the fact of the mortgage by proving the mortgage bond in accordance with law. The matter is concluded by the decree obtained by him on the basis of his mortgage by which defendant 1 is bound.

[6] The position, therefore, is that the plaintiff is the owner of the disputed properties in his right as a subsequent mortgagee and is a person against whom all rights of redemption have been lost by the parties concerned. This also includes defendant 1 who, however, has a different position, namely, that of a subrogee of a prior mortgage. As pronounced in the Full Bench case, above referred to, the clear position is that the plaintiff will now be entitled to redeem defendant 1 who thereupon on his part will be called upon to redeem the plaintiff not only by paying up his dues under the second mortgage but also by paying up what he pays to defendant 1 by way of redeeming the prior mortgage, because in the happening of that event, he becomes a subrogee to the position of the prior mortgagee again. If defendant 1 redeems the plaintiff, he will be entitled to retain the property. In case he does not choose to do so, the plaintiff will be entitled to retain the property after redeeming defendant 1. This is the final definition of the respective position of the parties with regard to the respective rights and liabilities against each other the details of which, however, have to be worked out by the trial Court who will fix the time for redemption by respective parties and calculate and pronounce the amounts that are due by each of the parties against the other. The case is, therefore, remitted back to the trial Court, who will pass his final orders in the light of the principles laid down above and after working out the rights and liabilities of the respective parties as against each other and assigning to them the respective positions that I have clearly defined in the previous paragraphs.

[7] In the result, the judgments and decrees of the Courts below are set aside, the appeal is allowed and the case is sent back to be disposed of in accordance with law bearing in mind the observations hereinbefore made. I make no order as to costs of this Court.

D.H. *Appeal allowed.*

**A. I. R. (35) 1948 Patna 113** *[C. N. 44.]*

**FULL BENCH**

AGARWALA AG. C. J., MANOHAR LALL AND RAY JJ.

*Kishun Dutt and others* — *Petitioners* v. *Gulabchand Prasad and others* — *Opposite Party.*

Civil Revn. No. 675 of 1943, Decided on 16-9-1947, against order of Sub-Judge, 1st Court, Gaya, D/- 8-11-1943.

**Civil P. C. (1908), O. 21, R. 10—Right of decree-holder to withdraw execution without permission of Court — Mortgage decree for sale — Effect.**

**The decree-holder has no absolute right to withdraw an execution case without the permission of the executing Court. He can however do so with the leave of the Court. He has the right to take out fresh execution of the same decree but subject to the orders, if any, passed by the Court in the previous proceedings at the time of dismissal or withdrawal, as the case may be. He will have no right to withdraw the execution case after the commencement of the sale in execution, except under the orders of the Court and the fact that the decree under execution is a mortgage decree for sale does not affect the position : 25 A. I. R. 1938 Cal. 615; 19 I. C. 904 (Cal.) and 17 All. 106 (P. C.), *Ref.*; 9 A. I. R. 1922 Pat. 525, *Disting.* [Paras 3, 14, 16]**

**Annotation : ('44-Com.) C. P. C., O. 21, R. 10, N. 1.**

*Cases referred:*—

1. ('22) 1 Pat. 232 : 9 A. I. R. 1922 Pat. 525 : 65 I. C. 122, Ram Prasad Rai v. Mahesh Kant Chowdhury.
2. ('38) 68 C. L. J. 70 : 25 A. I. R. 1938 Cal. 615 : 178 I. C. 432, Sital Chandra v. Ramesh Chandra.
3. ('13) 18 C. L. J. 53 : 19 I. C. 904, Kenaram Bakshi v. Kailash Chandra Dutt.
4. ('95) 22 I. A. 44 : 17 All. 106 : 6 Sar. 526 (P. C.), Thakur Prasad v. Fakir Ullah.
5. ('88) 10 All. 71, Sarju Prasad v. Sita Ram.
6. ('24) 46 All. 489 : 11 A. I. R. 1924 All. 328 : 84 I. C. 749 (F. B.), Mobarak Hussain v. Ahmad.
7. ('41) 22 P. L. T. 239 : 28 A. I. R. 1941 Pat. 354 : 192 I. C. 789, Sri Thakurji Ramji, Lachhmanji and Jankiji v. Mathura Prasad.

*Baldeva Sahay and Kanhaiyaji* — for Petitioners.
*P. R. Das, C. P. Sinha and M. Azizullah* —for Opposite Party.

**Order.**— The question involved in this civil revision is whether a decree-holder has an absolute right to withdraw an execution case, without leave of Court, at any stage of the execution proceedings, while leaving unaffected his right to take out a fresh execution.

[2] The facts giving rise to it, shortly stated, are: The petitioners 1st party (Nos. 1 to 8) decree-holders, obtained a decree for sale in a mortgage suit against the petitioners 2nd party (Nos. 9 to 13) and the opposite parties. The opposite party No. 1 is admittedly a subsequent purchaser of some interest in the mortgage property in execution of a money decree against one Ajodhya Prasad, one of the members of the joint family of the petitioners 2nd party, since deceased. The mortgage decree was put into execution in 1941 and the execution proceeding dragged on for two years till 6-11-1943 when sale of the mortgaged properties commenced. As the bids were not considered acceptable, it was adjourned to 8-11-1943, the 7th being a Sunday. On 8th November, a judgment-debtor, one of the petitioners 2nd party, and the decree-holders, alleging that they had come to an amicable settlement, the former paying to the latter a sum of Rs. 1000, in part satisfaction of the decree, applied that the sale should not be further proceeded with and the execution case should be dismissed on part satisfaction. It was asserted that this arrangement was reached in order to enable the judgment-debtors to pay the decretal amount, amicably, out of Court, and thereby to save their valuable properties from being sold away. The executing Court, however, on the objection of the remaining judgment-debtors, particularly opposite party No.1, declined to accede to this joint prayer and allowed the sale to proceed. The highest bid offered for the property, lot No. 1, was Rs. 51,700, a sum adequate to satisfy the decree which was in the neighbourhood of Rs. 40,000. Sale of property lot No. 2, was not held as no longer necessary. The highest bidder, however, failed to deposit the earnest money and the identical property No. 1 was re-sold on 9-11-1943, for a sum of Rs. 52,500. The aforesaid joint petitioners, however, repeated their prayer, by another application, on 9-11-1943, asking for re-consideration of the order passed on the previous date, or, in the alternative, to adjourn the sale for some time in order to enable them to move this Court. This petition too met the same fate as its predecessor and the sale did take place, as stated already on 9-11-1943. The validity of this sale is the subject-matter of consideration in this civil revision and the same is sought to be set aside as *ultra vires* the executing Court and the execution case to be dismissed on part satisfaction, as prayed in the Court below.

[3] It is contended by the petitioners that the learned Court below had no jurisdiction to sell the property after the decree-holders applied to withdraw the execution case. The civil revision came for hearing before Fazl Ali C. J. and Beevor J. The petitioners, in support of their contention, relied upon the decision in 1 Pat. 232,[1] where it was held in the different circumstances of that case that the decree-holder had the right to withdraw the execution petition at any moment he liked. The view as formulated in that decision was that though O. 23, Civil P. C., did not in terms apply to execution proceedings, it was a right inherent in a party, which sets the law in motion, to withdraw the proceedings from the Court. Their Lordships, after hearing the parties, were not inclined to

accept the correctness of the ruling cited. They, therefore, referred the case to a larger Bench, and that is how the matter has come before this Bench of three Judges. The questions referred to the Full Bench are: (1) Has decree-holder an absolute right to withdraw an execution case with or without the permission of the Court? (2) If so, has he the right, with or without the permission of the Court, to take out fresh execution of the same decree? (3) Is the answer to question (1), or question (2), affected by the fact that a sale has begun before the decree-holder applies to withdraw the execution case, and (4) Does the fact that the decree under execution is a mortgage decree for sale affect the answer to the previous question?

[4] The decision embodying the proposition, already referred to in 1 Pat. 232,[1] has been expressed in the following terms:

"The Munsif's order (rejecting the decree-holder's application to dismiss the execution case) was certainly without jurisdiction and not sanctioned by any provisions of the Civil Procedure Code. Execution was taken by the decree-holder and the powers of the Court with respect to that execution were invoked by the decree-holder. The application was made under O. 21, R. 1, and the nature of the relief and the mode for the enforcement of that relief were expressly stated by the decree-holder: *vide* Rr. 10 and 11 of O. 21. The decree-holder expressly prayed for the execution of the decree and for the sale of the property of the judgment-debtor. He had the right to withdraw the execution petition at any moment he liked. No doubt O. 23, which relates to the withdrawal and abandonment of a claim does not apply to the execution proceeding but there is nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he does not want to claim any relief in respect of the execution. The party which sets the law Court in motion has a right to withdraw the proceedings from the Court. Therefore, the order of the Munsif was wrong and he acted certainly without jurisdiction in persisting in selling the property in spite of the wishes of the decree-holder to the contrary."

[5] Almost the same question came twice for consideration before the Calcutta High Court, and the decisions of that Court are just to the contrary. One of the decisions is 68 C. L. J. 70.[2] The particular facts of that case—stating as much of them as are relevant—are that on 9-2-1938, there was an order of the Court executing a money decree to issue a proclamation fixing 19-4-1938 for sale. On the date fixed, that is, the 19th of April, the decree-holder put in a petition asking for permission to bid at the sale, and that was allowed. On the same date, on an application of the judgment-debtor, to which the decree-holder assented, two weeks' time was allowed, and the sale was put off until 3-5-1938. On that date an order was recorded directing the Nazir to conduct the sale and report. The next order was:

"Received Nazir's report. One Srimati Raj Lakshmi Mitter purchased the property at Rs. 32000. Put up tomorrow for acceptance of the bid."

(The judgment-debtor then applied for and gained some more time to deposit the decretal money before final acceptance of the bid.) The last order recorded on an application of the judgment-debtor was:

"He (judgment-debtor) is permitted to deposit the decretal amount before the acceptance of the bid and the bid is pending for Court's acceptance."

At this stage, that is, before the bid was finally accepted, the decree-holder filed an application withdrawing from the execution proceedings and asking to dismiss the same on non-satisfaction. The learned Judge, however, was of opinion that he ought not to allow the decree-holder to withdraw because a third party had entered on the scene and had acquired a position, if not an interest, which had to be taken into consideration. Later the executing Court accepted the bid. The order refusing the decree-holder's application for withdrawal was the subject-matter of revision before the Calcutta High Court in the above-mentioned case. While disposing of the application, Costello J. formulated the proposition in the following terms:

"No question of jurisdiction and, indeed, no question of the propriety of the Judge's order can possibly arise, unless it can be argued successfully that a decree-holder has an absolute and indefeasible right to withdraw from execution proceedings at any stage no matter that the situation may be."

Thereafter the learned Judge considered the decision in 1 Pat. 232[1] and distinguished the same with the following observations:

"but it is quite obvious on a perusal of the judgment that although taken out of its context that seems a categorical statement that a decree-holder has the right to withdraw an execution petition at any moment he likes, it is clear enough that the learned Judge was dealing with the particular facts of the case then before him and not making a generalisation."

The point of distinction between the decision of this Court just referred to and the case before Costello J. was that in the latter case some third person had come on the scene and had acquired either a position or an interest which would be prejudicially affected by withdrawal of the execution case, if given effect to. Thereafter Costello J. addressed himself to discuss whether the third party, in the case before him, had acquired any interest or not before acceptance of his bid and held that the Court below had jurisdiction to decide whether it was an interest or not, and then decided the case in the following manner:

"I have said that in the present instance the learned Judge rightly or wrongly took the view that a third party had acquired an interest. We are not concerned to enquire whether that was a right or whether it was a wrong view of the matter. Obviously, if the learned Judge took the view that there was somebody who had made a bid which he himself intended to accept, it was open to him to come to the conclusion that the decree-holder ought not to be allowed to withdraw at that particular stage. If the learned Judge was wrong in coming to the conclusion, as he may have been, that

this lady had acquired some legal interest as regards the property, that is not a matter which is a fit subject for review in proceedings taken under S. 115 of the Code."

This decision, therefore, amounts to pronouncing unambiguously a complete negation of the decree-holder's free and unlimited right of withdrawal and in favour of the Court's powers to refuse such a prayer in the interest of justice and fair play.

[6] If the decision be taken to be an authority for what it actually decides, the dictum laid down may be expressed in the following terms: that where a third party has been found to have acquired some sort of interest or other or even a position in further progress of the execution proceedings, it would not be beyond the jurisdiction of the executing Court to refuse to accede to the decree-holder's prayer for withdrawing the same. Unmistakably, however, there are observations in the judgment of the learned Judge which go much beyond that and support the view that the decree-holder has no absolute and indefeasible right to withdraw from execution proceeding at any stage, no matter what the situation may be.

[7] The other case of the Calcutta High Court, in which the point under consideration had come up, is the case in 18 C. L. J. 53.[3] In that case the sale proceedings went to the extent of bids having been offered, the decree-holder himself being the highest bidder. The decree-holder first of all wanted to withdraw the bid and that not being allowed, filed an application to withdraw the execution case which was granted. The judgment-debtor appealed to the District Judge against the order of withdrawal and the District Judge set aside the order and sent the case back to the Subordinate Judge for holding some enquiry as to whether the bid was authorised, and if not, to complete the sale in favour of the next highest bidder. Then the matter came before the High Court and the High Court held:

"The decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option. If he was permitted to do so, the judgment-debtor might be needlessly harassed and as a result prejudiced."

The ratio of this decision seems to be that, granting the decree-holder a right to withdraw, he cannot do so at such a stage of the execution proceedings when such withdrawal would result in injury or injustice to either the judgment-debtor or to some other person who has appeared on the scene and has acquired some interest or position in the execution proceedings.

[8] The decision of their Lordships of the Judicial Committee in 22 I. A. 44[4] (not cited at the bar) deserves examination in support of the contention that the decree-holder has an unobstructed and unlimited right of withdrawing an execution case from the Court at any time he likes. In this case the decree-holder applied for execution. He did not actively prosecute that application and on a certain date fixed for the case, his pleader stated that the case might be struck off for the time being. An order was accordingly made striking the case off the list, for default. When the decree-holder made a second application for execution, the question arose whether the application which had been struck off the list for default should be treated as a nullity and non-existent, and in that view, whether the later application for execution being beyond three years from the date of a still earlier application, would be barred by time. The learned Subordinate Judge treated the impugned application as affording a fresh starting point of limitation. An appeal was taken against this order to the Allahabad High Court, and the Court, following a previous decision in 10 ALL. 71,[5] held that the principle of S. 373 (corresponding to O. 23, R. 1) was properly applicable to execution proceeding and that where a decree-holder was represented in an execution proceeding by a pleader who came into Court and said:

"At present I am not desirous to proceed with this application owing to error in its form, and I ask that it may be struck off;''

and if he did not ask the sanction of the Court to put in a fresh application, he was in no better position than a pleader who appears for a plaintiff in a suit and says the same thing, in which case S. 373 would admittedly apply. The Subordinate Judge, who felt bound by 10 ALL. 71,[5] distinguished the case before him on facts having construed the order of dismissal of the execution case as amounting to the withdrawal with permission to bring a fresh execution case. Their Lordships of the Judicial Committee, while holding that the Subordinate Judge had given a very reasonable account of the meaning of the order, said that they would not further examine the question for their decision must be rested on the more general ground that the ruling in 10 ALL. 71[5] was erroneous. Their Lordships phrased their reasons for the decision in the following terms:

"And it is clear, both from the Code and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a succession of applications for execution. Under these enactments a course of practice has grown up in India. Whether it is an injurious practice, as intimated by the High Court in this case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay after one contrary decision, and the High Courts of Calcutta and Madras, have repeatedly affirmed the legality of the procedure which is struck at by the ruling in 10 All. 71.[5]''

[9] It is now to be considered whether in view of the dictum of the Privy Council as quoted

above, it can be correctly held that the decree-holder can withdraw an execution case at any stage at his option with a right to bring another execution case according as it suits his own convenience. It has to be borne in mind that on the particular facts of the case before their Lordships neither the judgment-debtor nor any other third person had appeared in the execution case nor were any such in any way, prejudiced with regard to their interest, in the execution proceeding. All that was held in that case was that the decree-holder after having defaulted in further prosecution of the execution case started by him, or after withdrawing the execution case without the leave of the Court to institute further execution, is not debarred from starting successive execution cases one after the other. But the question whether in cases where the execution has advanced to a stage in which to permit the decree-holder to withdraw would seriously prejudice either the judgment-debtor or any other person who has come to the scene on invitation by the Court at the instance of the decree-holder, has not been decided there. That it would be beyond the jurisdiction of the Court to prevent the execution case from being withdrawn, or being allowed to be dismissed, was not before the Privy Council; nor their Lordships had to consider a case in which nothing remains to be done by the decree-holder for further progress of the execution till its termination, and, therefore, any default on the part of the decree-holder would not stand in the way of the execution being proceeded with, nor if, in such circumstances, the Court can proceed with the execution case to prevent injustice to the other parties concerned, the decree-holder's withdrawal notwithstanding. Though in the various provisions of the Civil Procedure Code governing the procedure applicable to execution cases as distinguished from the procedure applicable to suits, there are implications permitting a succession of applications for execution notwithstanding their infructuousness brought about by the decree-holder's *ipse dixit*, there is nothing in any of such provisions permitting the decree-holder to have his own way in prosecution of an execution case even to the extent of abusing the process of the Court to the great hardship and injustice to others. As the law permits a succession of applications for execution under certain circumstances, similar is the case with suits in certain prescribed circumstances. When a plaintiff allows his suit to be dismissed for default in the absence of the defendant either before or after his appearance in the case, he is not prevented from instituting another suit on the same cause of action. If, under O. 23, R. 1, the plaintiff is required, in order to preserve his right to institute a fresh suit, to take leave of the Court, it is because he has to withdraw the suit as against one or more defendants. Occurrence of the words "as against one or more defendants" in the rule is significant. If the plaintiff withdraws his suit before the defendant appears certainly he is not required, in order to enable himself to institute another suit on the same cause of action, to get leave of the Court. The facts of the cases of the Calcutta High Court, above referred to like the present case, afford some of the instances of serious prejudice or harm to the judgment-debtor in one case and to a third party in the other. In the case before us the execution had reached a stage where the decree-holder had nothing further to do for its prosecution but what remained to be done was to be done by the Court and by the auction-purchaser. There was nothing in respect of which the decree-holder could default. The property NO. 1 which had been auctioned had fetched a price of RS. 51,000 odd, an amount more than the decretal amount, with the result that in the event of the bid being accepted or the sale being confirmed, the judgment-debtors were to reap the benefit of the release of property NO. 2 from sale. The decree-holders had in that case, nothing to lose. The executing Court has found very rightly that the petition for dismissal of the execution case is not a *bona fide* one. It would no doubt amount to an abuse of the process of the Court to permit the decree-holder to nullify the entire proceeding to the serious prejudice of the judgment-debtors or any one of them and the bidders who have already appeared on the scene. In such a case it is to be seen whether there is anything in the Code which prevents the Court from exercising its own inherent power and jurisdiction to prevent injustice resulting from abuse of its process.

[10] We are definitely of opinion that there is nothing in the Code or in the general principles of law and procedure which will make such an order, as has been passed in this case, without the jurisdiction of the executing Court.

[11] With regard to 1 Pat. 232,[1] it can be well said that it is clearly distinguishable on facts. From the report it appears that the decree-holder's application to dismiss the execution case was filed before the sale commenced and that dismissal did not involve any detriment to the interest either of the judgment-debtor or of any third party. There was no finding that the decree-holder's application was other than *bona fide*. The decision cannot be taken to be an exposition of the whole law on the subject. It is a decision on its own facts.

[12] Mr. L. K. Jha for the petitioners further contended that sale of mortgage property by Court is not made by way of a decree for its satisfaction but of enforcement of mortgage

contract and, as such, it is beyond the competence of the Court to hold a sale against the wishes of the mortgagee. This proposition, even if correct, is quite foreign to the point at issue, namely, who will control the process of the Court in the matter of an execution sale in a mortgage-decree—the Court or the decree-holders. Reliance is placed in support of the contention on the case in 46 ALL. 489.[6] The question that came up for decision in that case was whether the proviso to S. 60, Civil P. C., applied to sale in execution of mortgage-decree. The determination of the question, according to their Lordships who decided the case, turned upon the meaning of the words "not liable to such attachment or sale" in the proviso as compared with the words "liable to attachment and sale" occurring in the main section. Walsh J. expressing the majority view held "such attachment or sale" in the proviso must mean the same thing as "attachment and sale" as used in the section, the word "such" taking away the distributive force of "or." In this view it was held that as no attachment is necessary in the case of a mortgage-decree, the proviso does not apply to such sales. By way of finding out if there could be any justification for such distinction Walsh J. said sales in mortgage cases owed their origin to contract of parties while in case of money-decrees the source was order of the Court. While so holding Walsh J. said :

"This is not to say that the procedure is not, after decree, for the execution side. Any question which may arise relates to the satisfaction of the decree and is, therefore, within S. 47."

The question that is before us relates to procedure rather than to the origin of the title passed by such sale. The ruling is no authority for the proposition that the Court derives its power and jurisdiction to sell from the contract as between the parties, and that the decree-holder is in control of the proceedings and not the Court. Walsh J. made it clear in the passage already quoted that the distinction in the origin of the two kinds of sales did not affect the nature and character of the proceedings set on foot for carrying them out. The ruling cited does not help the petitioners' case to any extent whatsoever.

[13] In this view of the matter, the difference between a sale in execution of a mortgage-decree and a sale in execution of a money-decree in relation to a question of limitation, as pointed out by Chatterji J. in 22 P. L. T. 239,[7] at pp. 254-55, is of no relevance.

[14] In short, the position is that the decree-holder cannot have an absolute and unrestricted right of withdrawing an execution case without leave of the Court.

[15] In the result, we are of opinion that the order passed by the executing Court refusing to dismiss the execution case does not suffer from lack of jurisdiction nor is it vitiated by any illegality or irregularity in assumption or exercise of jurisdiction. The civil revision must be dismissed with costs.

[16] In consideration of what we have said before, we answer the questions referred to us in the following manner : Question No. 1 is divisible into two parts. One part is whether the decree-holder has the absolute right of withdrawal without leave of Court and the answer to this will be in the negative. The answer to the other part, namely, whether he has such right with leave of the Court will be in the affirmative. Question No. 2 —Yes, he has such a right but subject to the orders, if any, passed by the Court in the previous proceeding at the time of dismissal or withdrawal, as the case may be. Question No. 3—The decree-holder will have no such right to withdraw the execution case after commencement of the sale except under orders of Court. Question No. 4—Answer to this question will be in the negative.

S.C. *Revision dismissed.*

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**A. I. R. (35) 1948 Patna 117** *[C. N. 45.]*

MEREDITH J.

*Boyini Kanganna—Defendant—Appellant* v. *Pedini Ramlingam Subudhi—Plaintiff—Respondent.*

Appeal No. 128 of 1942, Decided on 13-9-1946, from appellate decree of Dist. Judge, Berhampore, D/- 3-3-1942.

**Civil P. C. (1908), S. 80—Suit against private individual and public officer — Notice under S. 80 not served—Effect.**

Where a suit is brought against a private individual and a public officer but no notice under S. 80 is served on the public officer, the test, as regards the question whether failure of notice on the public officer would involve the dismissal of the suit in its entirety, is to see whether the suit would be maintainable as against the private individual without impleading the official and in such a case the official can be struck out and the suit can be allowed to proceed against the private individual: *Case law discussed* ; 25 A. I. R. 1938 Pat. 127, *Not foll.* [Paras 6 and 11]

**Annotation.**—('44-Com.) C. P. C., S. 80, Note 2, Pt. 7.

*Cases referred* :—

1. ('38) 25 A. I. R. 1938 Pat. 127 : 174 I. C. 358.
2. ('41) 28 A. I. R. 1941 Pat. 461 : 194 I. C. 263.
3. ('07) 29 All. 325.
4. ('31) 58 Cal. 850 : 18 A. I. R. 1931 Cal. 503 : 132 I. C. 634.
5. ('27) 54 I. A. 338 : 14 A. I. R. 1927 P. C. 176 : 51 Bom. 725 : 104 I. C. 257 (P. C.).
6. ('31) 18 A. I. R. 1931 Mad. 175 : 54 Mad. 416 : 129 I. C. 456.
7. ('36) 23 A. I. R. 1936 Pat. 339 : 15 Pat. 353 : 161 I. C. 690.
8. ('39) 26 A. I. R. 1939 Pat. 32 : 177 I. C. 709.

*P. V. B. Rao* — for Appellant.
*P. C. Chatterji* — for Respondent.

**Judgment.**—This second appeal is by defendant 1 in an action for damages for malicious

prosecution. The appellant is a private individual, but there was also a defendant 2 impleaded who was the village Munsif and as such a "public officer" within the meaning of S. 80, Civil P. C. It was not alleged that any notice under S. 80 had been served upon defendant 2, nor did the plaint contain the required averment.

[2] The case stated in the plaint was that defendant 1 was a mere tool in the hands of defendant 2, the village Munsif, who was an enemy of the plaintiff, and that both the defendants actuated by malice concocted a false story and submitted a false report to the police and the Magistrate of the commission of a criminal offence by the plaintiff for which he was put on trial and acquitted.

[3] The findings, however, which have been arrived at by both the Courts of fact are that the proceedings against the plaintiff were instituted maliciously and without any reasonable and probable cause by defendant 1 alone who made a false report to defendant 2, and the latter did not act beyond what he was authorised to do under the law.

[4] On these findings the Munsif dismissed the suit in its entirety on the ground that the failure of notice under S. 80 on defendant 2 necessarily involved the dismissal of the whole suit.

[5] The learned District Judge on appeal observed:

"It is true that if the causes of action against both the defendants are inseparable, the claim against defendant 1 would not be maintainable when notice was not served on defendant 2 under S. 80,"

but it had been found that the real cause of action was against defendant 1 and there was no cause of action against defendant 2, and, therefore, he thought that, while the suit was bad as against defendant 2, it was not bad against the first. Accordingly he gave a decree against the appellant for Rs. 1000, half for the expenses incurred in the criminal case and half for bodily and mental suffering and loss of reputation.

[6] The question which has been raised in second appeal is whether the Munsif's view or the District Judge's view was correct. I may say at once that in my opinion, the District Judge took the correct view. I think the test in cases of this kind is whether the suit would be maintainable as against the private individual, without impleading the official, and in such case I see no reason why the official should not be struck out and the suit be allowed to proceed against the private individual in the case of whom no notice under S. 80 was at all necessary. For the appellant reliance is placed, in particular, on two decisions of Rowland J. sitting singly. The first is *Baldeo Prasad* v. *Sukhi Singh* (A. I. R. 1938 Pat. 127)[1] and the second is *Noor Mohammad* v. *Abdul Fateh* (A. I. R. 1941 Pat. 461).[2] The view of Rowland J. is shortly stated in the latter case as follows:

"The question then arises whether the bar of S. 80 applies to the suit as a whole or only to the claim for relief against these two defendants (the officials). The operative portion of S. 80 is 'no suit shall be instituted against etc.' and the consequence of instituting a suit in face of a statutory prohibition is that under O. 7, R. 11, Civil P. C., the plaint should be rejected. It has been held in the Allahabad High Court in *Raghubans Puri* v. *Jyotis Swarupa* (29 All. 325)[3] that a Court cannot reject a plaint in part. It has also been held in the Calcutta High Court in *Jagadish Chandra* v. *Debendra Prasad* (58 Cal. 850)[4] that the proper course in a case like the present is to reject the plaint. The Privy Council decision in *Bhagchand Dagadusa* v. *Secretary of State* (54 I. A. 338)[5] makes it quite clear that the requirements of S. 80 cannot be evaded or explained away and that a suit instituted in contravention of S. 80 is unsustainable *in limine*."

No doubt, in *Raghubans Puri* v. *Jyotis Swarupa* (29 ALL. 325)[3] it was held that a plaint cannot be rejected in part, but that was where the suit was against a single defendant, and the decision is not necessarily applicable where there are two defendants and the cause of action is separable. In the other case relied upon, *Jagadish Chandra* v. *Debendra Prasad* (58 Cal. 850)[4] it appears that the public officer was the principal defendant, and the question of whether a suit could in the circumstances proceed against non-officials does not seem to have been considered.

[7] In the Privy Council case it was merely laid down that the provisions of S. 80 must be strictly observed, and that the Bombay view to the contrary was wrong. As I read the judgment, their Lordships were careful to leave the particular question, which we are now considering, open. According to the statement of fact the suit was against the Secretary of State, the Collector and the District Magistrate, all public officers. But, however that may be, as appears from the second last paragraph of the judgment, an attempt was made to distinguish between the effect of S. 80 in the case of the Secretary of State and in the case of the Collector, and to argue that even if it defeated the action as against the former it would fail to protect the latter. Their Lordships rejected this contention but on the ground that the suit had been throughout a joint proceeding for the purpose of getting a joint declaration that the Government Notification in question was bad as the foundation of everything subsequently done, and, in the circumstances without the presence of the Secretary of State before the Court, the notification could not be assailed, and, if it stood as valid, the Collector's action could not be successfully impugned. Thus, they rejected the contention on the express

ground that the Secretary of State was a necessary party to the action to make it maintainable, and no other ground was mentioned. Moreover, in the next paragraph their Lordships said, "Whatever may be the case between other parties, as against the respondents, they (the plaintiffs) must fail."

[8] Reliance has also been placed on a single Judge Madras case, *Venkata Rangiah* v. *Secretary of State* (A. I. R. 1931 Mad. 175).[6] Whether the view taken in that case be correct or not, it has, in my opinion, no bearing upon the question before us. It was a case where two persons jointly sued the official, and the notice was served by one, and not served by the other. In such circumstances it was held that the plaint should be rejected as a whole.

[9] There are two Patna cases, one of them a Division Bench case, where the course adopted seems to me inconsistent with the view taken by Rowland J. The first is *Secretary of State* v. *Amarnath* (A. I. R. 1936 Pat. 339).[7] That was a case where the suit had been brought against the Secretary of State and others, and the Secretary of State in appeal took the point that the notice under S. 80 had not been served. The order of the Bench was to expunge the Secretary of State from the action, and otherwise to endorse the order of the District Judge remanding the case to be disposed of against the remaining defendants on the merits.

[10] The other case is *Registrar, Co-operative Societies* v. *Ramkishun Mandar* (A. I. R. 1939 Pat. 32)[8] where James J. sitting singly, on the appeal of the Registrar dismissed the suit as against him, but observed that the decree as against the other defendants was not affected by the order.

[11] In the present case I do not think it can be contended, as Mr. Chatterji for the respondent has sought to do, that no notice under S. 80 was necessary, whether he was acting in good faith or not, what the village Munsif did purported to be done in execution of his duty as such and it has been so found. But I can see no reason why the suit should not proceed in the absence of notice against the appellant, in whose case no notice was necessary. A suit against him alone, without impleading defendant 2, would have been fully maintainable, and no difficulties could arise by striking defendant 2 from the action. If we regard defendant 2 as having been struck off, there would be no defect in the plaint necessitating its rejection under O. 7, R. 11 (d), Civil P. C.

[12] It has further been argued for the appellant that the plaint shows the acts of the defendants so intermingled as to make on those allegations a decree against one alone impossible, the allegations being joint against each. I do not agree with this view on the plaint as it stands, but, in any event, upon the findings, as I have already indicated, there is no reason why there should not be a decree against the appellant alone in whose case alone there was found to be any real cause of action.

[13] In my view the appeal fails, and it is accordingly dismissed with costs.

D.H. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 119** *[C. N. 46.]*

MANOHAR LALL AND MEREDITH JJ.

*Motamal Jethamal* v. *Commissioner of Income-tax, Bihar and Orissa.*

Misc. Judicial Case No. 150 of 1945, Decided on 20-12-1946.

**Income-tax Act (1922), S. 10 — Profits and gains of business — Loss of part of stock-in-trade due to accidental fire is allowable deduction as trading loss.**

The loss of part of the stock-in-trade due to fire is allowable as a trading loss on ordinary principles of commercial accountancy irrespective of the fact whether any part of it is insured or any sum is received from the Insurance Company, if it is insured. The Income-tax Department cannot be allowed to treat the sum recovered from the Insurance people as if it were a turn over of the equivalent amount of the goods destroyed by fire and not to allow the deduction for the value of the goods destroyed by fire, otherwise the position is that on the one hand they treat the goods destroyed by fire as a turn over when the amount is received from the Insurance people but they do not treat this as a turn over when it comes to the deduction side: *English case law discussed.* [Para 12]

Consequently, in computing the profits and gains of a business (dealing in grains, groceries, jute and cloth) under S. 10, a sum representing the value of the stock-in-trade of the assessee's business, destroyed by an accidental fire, is an allowable deduction as a trading loss. [Paras 1 & 16]

*Cases referred* :—

1. (1892) 3 Tax Cas 185:1892 A. C. 309:62 L. J. Q. B. 41 : 67 L. T. 479 : 41 W. R. 270, Gresham Life Assurance Society v. Styles.
2. ('31) 5 I. T. C. 363 : 18 A. I. R. 1931 P. C. 165 : 54 Mad. 691 : 58 I. A. 239 : 132 I. C. 619 (P. C.), Pondicherry Railway Co. Ltd. v. Commr. of Income-tax, Madras.
3. (1925) 12 Tax Cas 813, Whimster & Co. v. Commr. of Inland Revenue.
4. (1888) 2 Tax Cas 321 : 13 A. C. 418 : 58 L. J. P. C. 8 : 59 L. T. 481, Russell v. Town and County Bank.
5. (1914) 6 Tax Cas. 399: 1915 A.C. 433:84 L. J. K. B. 417 : 112 L. T. 651, Usher's Wiltshire Brewery Ltd. v. Bruce.
6. (1924) 8 Tax Cas 725, Union Cold Storage Co. Ltd. v. Jones.
7. (1929) 14 Tax Cas. 364 : 1929 A. C. 381 : 98 L. J. K. B. 363 : 140 L. T. 625, Gliksten & Son, Ltd. v. Green.
8. ('30) 4 I. T. C. 438 : 17 A. I. R. 1930 Mad. 808 : 53 Mad. 904 : 127 I. C. 611 (F.B.), Ramaswami Chettiar v. Commr. of Income-tax.
9. (1931) 16 Tax Cas, 595, Rownson, Drew and Clydesdale, Ltd. v. Commrs. of Inland Revenue.
10. (1906) 5 Tax Cas. 215 : 1906 A. C. 448, Strong & Co. v. Woodifield.

*S. K. Mazumdar* — for Applicant.

*S. N. Dutt* —for Respondent.

**Manohar Lall J.** — This is a reference by the Appellate Tribunal under s. 66 (1), Income-tax Act, asking for the opinion of this Court on the question

"whether the aggregate sum of Rs. 24,506 representing the value of goods destroyed by fire, in the circumstances of the case, is allowable as a deduction in computing the profits and gains of the assessee business under S. 10, Income-tax Act."

[2] The facts are these. The assessee is a dealer in grains, jute, groceries and cloth. In the accounting year of the assessee which is 1997 Sambat corresponding to 1940-41, a fire broke out in the vicinity of the assessee's shop which ultimately spread out and affected his godown with the result that his goods worth Rs. 17,552, jute worth Rs. 6954 and currency notes worth Rs. 3228 were destroyed. The assessee claimed a set-off against his income in the accounting year for these three sums as his business loss. The claim was disallowed by the Income-tax Officer on the ground that this was a capital loss in these words:

"During the accounting year there was an accidental fire in assessee's shop in which a good portion of his stock-in-trade, fixed assets and cash, was burnt. Item (3) above (that is to say currency notes) is clearly a capital loss and is added back .... The assessee lost his stock-in-trade due to an accidental fire. This loss which is due to the shortages of C. S. lost in fire, is thus more a capital loss. These are, therefore, not incidental to business, and are added back."

[3] In appeal, the assessee's claim was rejected in these words:

"The loss of stock-in-trade is a revenue loss only when it occurs by a cause usual in the course of business and is by its nature incidental to the carrying on of the business. The break-out of the fire was an unfortunate accident not attributable to any operations carried on during trade. The destruction of currency notes and goods was thus purely by reason of an unexpected accident, and therefore the loss was a loss of capital not deductible from taxable profits."

[4] In second appeal, the Appellate Tribunal rejected the claim in these words:

"It must be conceded that the goods that were destroyed by fire formed part of the assessee's stock-in-trade. But, in our view, such loss was not in the nature of a trading loss. It cannot be said to be anything arising out of, or connected with, the assessee's trade or business. The loss to be incidental, must be such as, in the ordinary course and having due regard to the peculiar risks attendant upon the conduct of the business, is likely from time to time to occur. The loss due to fire may be remotely connected with the trade, but in no sense can it be said to be incidental to the trade itself."

[5] In making the reference to this Court the Appellate Tribunal points out that the claim for deduction of Rs. 3228 representing the value of currency notes destroyed was not objected to before them in appeal. This question, therefore, does not arise for our consideration. The Appellate Tribunal further observed that it must be conceded that the goods that were destroyed by fire formed part of the assessee's stock-in-trade, and therefore, the simple question for our determination is whether the loss of a part of the stock-in-trade of the assessee due to accidental fire can be allowed as a trading loss.

[6] Mr. Mazumdar on behalf of the assessee and the learned standing counsel on behalf of the Income-tax Department drew our attention to a number of Indian decisions, but none of these have a direct bearing on the question for our decision. The matter, therefore, has to be decided on general principles and with the aid of some English decisions and the practice in England.

[7] It is necessary to bear in mind that the thing to be taxed is the amount of profits or gains of the trade or business and that the word profit should be understood in its natural and proper sense—in a sense which no commercial man would misunderstand—per Lord Chancellor Halsbury in (1892) 3 Tax Cas. 185[1] approved by the Privy Council in 5 I. T. C. 363.[2] Lord President Clyde in (1925) 12 Tax Cas. 813[3] stated at page 823:

"In computing the balance of profits and gains for the purposes of income-tax or for the purposes of excess profits duty, two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid over to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income-tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower, although there is nothing about this in the taxing statutes."

Lord Herschell observed in (1888) 2 Tax Cas. 321[4] that

"the profit of the trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts .... Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied."

In (1914) 6 Tax Cas. 394,[5] Lord Parker observed that where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed provided there is no prohibition against such an allowance.

[8] It is now well settled that in England a trader is allowed to deduct the amount paid for insurance effected on his goods or stock-in-trade. It is true that in (1924) 8 Tax Cas. 725[6] Rowlatt J. refused to allow any deduction being made for

fire insurance premium and this view was upheld in the Court of Appeal. The Master of the Rolls (Pollock M. R.) observed at p. 741:

"It may have been prudent that as owners they should keep the premises insured, but what they secured by it is not a further market for their business, not an increased sale of their commodities, not an enlarged use of their services which they are prepared to render; what they have secured is an indirect result perhaps useful to, but not directly necessary to their own trade."

But the better view is given in the House of Lords case in (1929) 14 Tax Cas. 364.[7] Lord Hanworth M. R. pointed out at p. 377 that insurance, whether against marine risks or fire risks, is a part of the ordinary duty of the trader in carrying on his business and that governed by ordinary business prudence, and mindful of the fact that untoward events take place both by land and by sea, the company take steps to insure an indemnity being paid to them whether they lose their stocks in transit to them by perils of the sea, or whether they lose it *in situ* on land by the perils and misfortune of fire. At the top of p. 378 he states that it was agreed that the premiums which were paid for insurance, whether for marine or for fire, were proper subjects for deduction in the ordinary trade account. Sargant L. J. pointed out at p. 380 that "fire is an event which has to be taken into account as an ordinary risk of a company" which was doing large business in timber.

[9] This commercial view has now been adopted by the Indian Legislature in S. 10 (2) (iv) which directs that the profits and gains of the business shall be computed after making a deduction in respect of insurance against risk of damage or destruction of buildings, machinery, plant, stocks or stores used for the purposes of the business.

[10] What then is the practice with regard to the deduction of the value of that portion of the stock-in-trade of a trader which has been destroyed by fire? The English practice is stated in Sander's Income-tax, Edn. 3, at p. 203:

"Loss of stock through fire is deductible in so far as it is not recovered by insurance, but loss of building does not form an admissible deduction."

I was unable to get this book in our library, and I am quoting this from the judgment of Ananthakrishna Aiyar J. in 3 I. T. C. 438.[8]

[11] In *Gliksten's case*, (1929) 14 Tax Cas. 364[7] referred to above, the trading account of the assessee is printed at pp. 373 and 374. This account is in the normal form. It starts with the stock-in-trade in hand at the beginning of the year on the left hand side, then the amount of the purchases and freight etc., then there is the item of £3000 for insurance and then the total is made up. On the right hand side, the amount of sales and the actual stock-in-trade which was left at the end of the year is shown, and then the stock-in-trade destroyed by fire is also valued at the cost price. In the year in question the assessee had recovered from the Insurance Company a larger sum than the value of the timber destroyed as stated by them on the right hand side but they did not bring it on the left hand side in the trading account as a receipt. It was argued on their behalf that as they did not deal in fires the sums received from the company should be treated not as having provided money to take the place of the goods destroyed by fire but as having prevented the fire. But this argument was overruled both by Rowlatt J. and by the Master of the Rolls and by the House of Lords. But it is important to observe that no objection was taken that the assessee was not entitled to show on the right hand side the value of the timber destroyed by fire. The Master of the Rolls who examined the trading account observed at p. 377 that the expenses, whether the freight for bringing fresh stock-in-trade to the premises of the company, the insurance for insuring the transit of the timber from overseas, are all items which must be found in the trading account as part of the ordinary business of the trader and also observed at p. 378 that no deduction could be made where there has been a loss in respect of any sum recoverable under an insurance or contract of indemnity, and proceeds:

"It appears to me to mean this, that if you have got a loss of, say £100,000 and, let us say £75,000 is replaceable or recoverable under a contract of indemnity then to the extent of that £75,000 you are not to make any deduction as if it were a loss, because instead of its being a loss the sum is replaceable or recoverable under a contract of indemnity."

It will be noted that the Master of the Rolls does not say that the balance of £25,000 will not be deducted. In the House of Lords their Lordships observed that the result of the fire was that they got rid of so much timber and got the insurance money at that figure and the assessee was precisely in the same position as if they got rid of it by giving it to a customer and it was treated as a turn over in the ordinary course of their business. Supposing the timber had been sold to a customer and he had failed to make any payment at all and the amount due from the customer had been lost or had become irrecoverable, it cannot be seriously argued that such a loss would not have been a trading loss.

[12] In my opinion, therefore, the loss of a stock-in-trade due to fire is allowable as a trading loss on ordinary principles of commercial accountancy irrespective of the fact whether any part of it is insured or any sum is received from the Insurance Company, if it is insured. The Income-tax Department cannot be allowed to treat the sum recovered from the Insurance

people as if it were a turn over of the equivalent amount of the goods destroyed by fire and not to allow the deduction for the value of the goods destroyed by fire, otherwise the position is that on the one hand they treat the goods destroyed by fire as a turn over when the amount is received from the Insurance people but they do not treat this as a turn over when it comes to the deduction side. The only other case which I have been able to discover is the case in (1931) 16 Tax Cas. 595[9] in which the assessee was held taxable for the amount which they received in respect of loss by fire and marine casualties in 1918 from the underwriters although the goods had not been insured. Rowlatt J. refused to treat this as a mere charity or a gift and held that on the assessee's own accounts this must be treated as a trading receipt which was paid to them by the underwriters for the loss incurred by the assessee.

[13] I have stated that there is a clear finding in this case that the goods that were destroyed by fire formed part of the assessee's stock-in-trade. Therefore, in my opinion, the assessee is entitled to claim a deduction for the price of these goods as a trading loss.

[14] The Appellate Tribunal relied upon the observations of Lord Chancellor in the leading case in (1916) 5 Tax Cas. 215[10] that the loss by the assessee was not sustained by him in his character as a trader nor was it in the course of the carrying on the business. I am wholly unable to agree with this view for the reasons stated above.

[15] The cases relied upon by the learned Standing Counsel were cases where either a theft or dacoity occurred in the premises of the assessee or where a certain sum which the assessee was sending to the bank was stolen in the course of the transit or where a shortage of cash was found in the till or where certain embezzlements were made by a gomasta. The present case is entirely different and, therefore, I find it unnecessary to consider those cases.

[16] The answer to the question submitted to us is in the affirmative. The assessee is entitled to the costs of this Court. I would assess the hearing fee at Rs. 250. The assessee is also entitled to a return of a sum of Rs. 100 which he deposited with the Appellate Tribunal as fees for the reference to this Court.

[7] **Meredith J.** — I agree that the question must be answered in the affirmative. To my mind, whether fire is a risk incidental to a business must to some extent depend on the nature of the business; but I have no doubt that fire is a risk incidental to any business dealing in inflammable materials and I think, grain is sufficiently inflammable to justify the view that it is a risk incidental to a grain business. Cases are not unknown where grain heats up especially in the holds of ships, and catches fire by spontaneous combustion. Insurance against fire would, therefore, be an entirely reasonable and wise act on the part of the keeper of a grain godown. The Income-tax Act allows deduction in the profit and loss account of a sum spent in insurance premium. This can only be on the view that insurance is a justifiable expenditure, and the expenditure can only be justifiable, if it is to guard against a risk incidental to the business. The fact, therefore, that the law allows the insurance premia to be deducted, to my mind, carries the inevitable consequence that loss of stock by fire can also be deducted, and this view is confirmed by the fact that if the Insurance Company pays the claim the sum received must be shown on the profit side. It would be against all principle to force a man in his profit and loss account to show the compensation paid on the one side as a profit, without showing the value of the stock destroyed on the other side as a loss. There is no question of its being a capital loss in the case of stock in trade, though that might be so in the case of a building destroyed by fire.

[18] The Tribunal seems to have been obsessed by the fact which it emphasised, that the fire was "unexpected" and "accidental." In one sense, no doubt, it is so, but in another sense it is not. From the long term view which a sensible businessman must take the risk of fire can be worked out year over year upon the average, so that from this point of view there is nothing unexpected about it. In determining the rates which they must charge for insurance an Insurance Company must work out very exactly the risk of fires upon the average. There is nothing unexpected or accidental from their point of view, and neither can there be from the point of view of the big business man in working out what he must allow on the average for loss by fire in his business. That, in my opinion, should also be the point of view of the Income-tax authorities in determining whether fire is an incidental risk in any business. On the long view certain losses by fire, to be properly covered by insurance, far from being unexpected or accidental are inevitable. The Tribunal, therefore, has applied the wrong criterion.

K.S. *Answer in the affirmative.*

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**A. I. R. (35) 1948 Patna 122** *[C. N. 47.]*

RAY J.

*Yusuf Khan* v. *Emperor.*

Cri. Revn. No. 117 of 1946, Decided on 20-11-1946.

**(a) Criminal P. C. (1898), S. 239—Stage for deciding whether accused should be tried jointly or severally.**

**In order to determine whether the joint trial of the accused persons is bad on account of misjoinder of persons and charges, the Court should not look to what is ultimately found to have been the facts but what were the accusations when the accused persons were put on trial : 25 A.I.R. 1938 P. C. 130, *Rel. on.* [Para 5]**

**In determining the accusations the Magistrate ought to apply his judicial mind to the facts before him both as they are stated in the earlier and later stages of the prosecution. The Magistrates will exercise their discretion fairly and honestly, and in case of their failure, their decisions are liable to revision by their superior Courts. The High Court must be vigilant and resolute to see that the accused are not prejudiced or embarrassed by an improper joinder of parties or of persons accused. When at the framing of the charges the accusations have been varied in material particulars from stage to stage, it is not beyond the power of either the Magistrate having had to frame the charge or of the Court of revision or appeal to reject that part of accusation which seems to be an afterthought.**

**[Para 9]**

**Annotation: ('46-Com.) Cr. P. C., S. 239, N. 6 Pt. 12.**

**(b) Criminal P. C. (1898), S. 239 (d) — "Same transaction"—Requisites.**

**Whether the offences are committed in course of the same transaction is to be judged from a common sense point of view. Uniformity of time or place are not sufficient to make one transaction of the acts committed then and there. There must be accomplishment of a certain object or performance of a certain act in view. In order that the different acts will make up one transaction, it must be inherent in them that from the very beginning of the earliest act or the first act, the other acts should either be in contemplation, or should from the very nature of the transaction in view form the component parts of one whole. Continuity of action is not intended in the sense that one act must immediately follow the other without any other connection. Continuity refers not to the time so much as to the intimate connection between the acts. *Case law referred.* [Paras 11 and 14]**

**Annotation : ('46-Com) Cr. P. C., S. 239 N. 6.**

***Cases referred* : —**

**1. ('38) 65 I. A. 158 : (1938) 1 M. L. J. 647 : 25 A.I.R. 1938 P. C. 130 : I. L. R. (1938) 2 Cal. 295 : 32 S.L.R. 476: 174 I.C. 1 (P.C.), Babulal Chaukhani v. Emperor.**

**2. ('06) 30 Bom. 49, Emperor v. Datto Hanmant.**

**3. ('29) 53 Bom. 344 : 16 A.I.R. 1929 Bom. 128 : 116 I.C. 243: 30 Cr. L. J. 588, Gopal Raghunath v. Emperor.**

**4. ('38) 25 A.I.R. 1938 Cal. 258: I.L.R. (1938) 1 Cal. 588: 175 I. C. 409 : 39 Cr. L. J. 596, Akhil Bandhu Ray v. Emperor.**

**5. ('35) 22 A.I.R. 1935 Cal. 312: 62 Cal. 808 : 156 I.C. 192, Kashiram Jhunjhunwalla v. Hurdat Rai Gopal Rai.**

**6. ('36) 60 Bom. 148 : 23 A.I.R. 1936 Bom. 154 : 162 I.C. 399: 37 Cr. L. J. 688, Sapurji Sorabji v. Emperor.**

**7. ('42) 29 A. I. R. 1942 Bom. 121 : 200 I.C. 261 : 43 Cr. L J. 621.(F.B.), Emperor v. Mahadeo Tatya.**

**8. ('35) 22 A.I.R. 1935 Nag. 141 : 31 N.L.R. 380 : 156 I.C. 120 : 36 Cr. L. J. 861, Bhairosing v. Emperor.**

**9. ('31) 18 A. I. R. 1931 Pat. 52 : 130 I.C. 269 : 32 Cr. L. J. 478, Ganesh Prosad v. Emperor.**

**10. ('31) 18 A. I. R. 1931 Pat. 102 : 130 I.C. 796 : 32 Cr. L. J. 611, Abdur Rahim v. Emperor.**

***D. Sahu* — for Petitioners.**

***Advocate-General* — for the Crown.**

**Order.**— This rule was issued on the District Magistrate of Cuttack to show cause why the conviction of the petitioners should not be set aside. The petitioner, Yusuf Khan, has been convicted under S. 323, Penal Code, and the petitioner, Budhu Khan, under S. 379, Penal Code, while both have been sentenced to rigorous imprisonment for two months each by the Sessions Judge of Cuttack in appeal on modifying their conviction under S. 394, Penal Code, by the Sub-divisional Magistrate, Kendrapara, for which they had been sentenced each to rigorous imprisonment for six months each and to a fine of Rs. 150 and Rs. 100 respectively.

[2] The learned lower appellate Court in interfering with the finding of the trial Court held that the assault committed by the petitioner Yusuf was not for the end of commission of theft, and, therefore, their offences did not fall under S. 394, Penal Code. They were, therefore, acquitted by him of this offence. The ultimate finding at which he arrived was :

"The two appellants might have remained waiting at the place for the complainant to pass along the road. They appeared when they saw the complainant approaching towards them. The appellant Yusuf started the quarreland assaulted the complainant. Up to this stage the common object of the appellants might be the same or similar, but when the other appellant Budhu found that Yusuf was able to overpower the complainant, Budhu ran away with the bundle and Yusuf followed him when he found that other travellers had come to or were approaching towards the spot."

[3] On this finding he convicted each of the petitioners for the specific offence committed by him by the specific act that he did.

[4] The trial Court's finding that the two acted in concert for voluntarily causing hurt for the end of committing robbery was dislodged. In these circumstances, it is argued by Mr. Sahu for the petitioners that as the acts amounting to offences committed by the accused persons were distinct and unconnected, they cannot be tried jointly. The learned Advocate-General in his reply to this argument invited attention to S. 239 (d), Criminal P. C., and contends that the act of assault by Yusuf and the act of theft by Budhu were committed in the course of the same transaction. The point to be determined, therefore, is whether the two acts together constituted one transaction committed, as they are, under circumstances of this case.

[5] The learned Advocate-General says that in order to determine whether the joint trial of the petitioners is bad on account of misjoinder of persons and charges, the Court should not look to what is ultimately found to have been the facts but what were the accusations when the accused persons were put on trial. The authority relied upon is the case in 65 I. A. 158 : 1938-1 M. L. J. 647.[1] Their Lordships expressed themselves in the following terms :

"Their Lordships are of opinion that the view adopted in India is correct, as the High Court have held in the present case. The clause deals with three matters, ac-

cusation, charge, trial. It says nothing about verdict. The condition is expressed in the words 'persons accused of different offences, etc.' It does not say 'rightly accused' or 'accused and convicted.' It is on the basis of what appears on the face of the accusation that the Court may proceed to charge and try. The accusation is necessarily anterior to the exercise of the discretion to charge and try. These are stages subsequent to the accusation. This view is strengthened by reference to S. 254 which states the duty of the Magistrate in warrant cases, such as the cases in question here. The duty so stated is that the Magistrate, when evidence has been taken, or at any previous stage of the case, if of opinion that there is ground for presuming that the accused has committed an offence triable under Ch .21 which he is competent to try and which in his opinion could be adequately punished by him, should frame in writing a charge against the accused. Similarly, in the case of trials in the High Court or Courts of Session, charges will be framed on the accusation. It is true that the opinion of the Magistrate may be wrong in law as to there being a same transaction, or the evidence which led him to think *prima facie* that this condition existed, may be insufficient or may eventually be falsified. It would result in any such events that the prosecution is enabled at the trial to join separate offences contrary to the terms of Ss. 234 and 235. And it has been affirmed that improper advantage is taken of S. 239 (d) so as to bring into one proceeding a great number of accused and a great multiplicity of offences, with serious hardship and injustice to the accused. If that were indeed the result of the section, as the High Court seem to be apprehensive it might be, it would be much to be regretted and might well be a ground for an amendment of the section by the Legislature if such practice prevailed notwithstanding the warning of the High Court and their determination to see that accused are not being unfairly dealt with and to prevent any procedure by which cases which should be comparatively short and simple become unwieldily complicated and lengthy. But even so that can be no ground why the Court should misconstrue the section. Indeed it is difficult to think that such apprehensions are justified. It must be hoped, and indeed assumed, that Magistrates will exercise their discretion fairly and honestly. Such is the implied condition of the exercise of every discretionary power. If they do not, or if they go wrong in fact or in law, then the accused has *prima facie* a right of recourse to the Superior Courts by way of appeal or revision."

[6] In this connexion their Lordships quoted with approval the following passage from the judgment of Batty J. : 30 Bom. 49.[2] The statement reads :

"Section 239 admits of joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction."

[7] They also referred to another passage from the judgment of Baker J. in 53 Bom. 344.[3] The statement is :

"So long as the accusation against all the accused persons is that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled, and the fact that the conspiracy was not established, would not vitiate the trial as regards those acts for which the evidence was sufficient for proof."

[8] The stage, therefore, at which it has to be decided whether the accused persons should be tried jointly or severally is the stage of accusation. The learned Advocate-General has cited the case in A. I. R. 1938 Cal. 258[4] in which it has been held that the stage of accusation is the stage when the Public Prosecutor opened the case. In this case the question arises whether for accusation one should depend upon the first information report or statement of the case in the charge-sheet submitted by the police or the evidence adduced in Court and recorded before the charge is framed. If the two differ materially so much so that if reliance is placed upon one, the joint trial would be bad, while relying upon the other, it would be good, which of the two is to be preferred for reliance at the relevant stage. In the present case the first information report and the statement of the prosecution case in the charge-sheet are to the effect that petitioner 1 was trying to purchase a piece of land which was ultimately purchased by the complainant. He, therefore, bore a grudge against him and had threatened him. While he (complainant) was going on a bike from his shop with a bundle containing a cash of Rs. 230 and his pucca account books, the petitioners were found coming from an opposite direction one following the other and of them Yusuf started a quarrel and assaulted the complainant first with a log of wood and later when he fell down from his bike as a result of the assault, he got upon him and began assaulting him. At this time, finding the complainant completely in the grip of petitioner 1, petitioner 2, Budhu, removed the bundle containing money and accounts and fled away. Petitioner 1 finding some persons approaching towards the spot, left the complainant alone and followed Budhu. In the evidence the case was presented in a materially different shape, namely, that the two petitioners wanted to purchase the land and on their failure, both of them bore a grudge to molest the complainant. In fulfilment of their common object or intention, they lay in ambush behind a bamboo-bush at a time when the complainant was expected to pass by it, and when he went past the bush, they came out, assaulted the complainant and snatched away the bundle. If the latter version be accepted for the purpose of deciding whether the two persons should be tried together, or, in other words, whether the offence of assault by one or offence of theft by another was committed in the same transaction, there should remain no doubt that the Magistrate was quite right in trying the petitioners jointly. If the former is taken to be the form of accusation, it would be difficult to hold that the offences were committed in the same transaction.

[9] The learned Advocate-General contends that it is the latter which should determine the

form of accusation for the purpose of determining whether the joint trial was good or bad. I cannot accede to this contention as a statement of an absolute rule. I should say on the impression that I have formed on reading the judgment of their Lordships of the Judicial Committee, that in such state of circumstances the Magistrate ought to apply his judicial mind to the facts before him both as they are stated in the earlier and later stages of the prosecution. Their Lordships have also expressed in no mistakable terms that the harmful consequences likely to flow from improper advantage being taken of S. 239 (d) so as to bring into one proceeding a great number of accused and multiplicity of offences with serious hardship and injustice to the accused can be avoided by the High Courts or any other superior Court exercising the powers of appeal or revision to rectify wherever the Magistrates or trial Courts go wrong in fact or in law. Their Lordships make it clear that the Magistrates will exercise their discretion fairly and honestly, and in case of their failure, their decisions are liable to revision by their superior Courts. The High Court must be vigilant and resolute to see that the accused are not prejudiced or embarrassed by an improper joinder of parties or of persons accused. Their Lordships no doubt have ruled out as untenable the contention that the legality of the trial has to be judged by the ultimate verdict on the facts forming the accusation; but their Lordships have never meant it to be laid down that when at the framing of the charges the accusations have been varied in material particulars from stage to stage, it is beyond the power of either the Magistrate having had to frame the charge or of the Court of revision or appeal to reject that part of the accusation which seems to be an afterthought. In this case I should say that in order to try the accused persons together on a charge under S. 394, Penal Code, the subsequent developments have been introduced into the accusation. I should, therefore, hold that the legality or otherwise of the trial should be judged by what a Magistrate exercising his discretion fairly and honestly (to use the words of their Lordships of the Judicial Committee) should have done in this particular case. I should, therefore, judge it on the allegations contained either in the first information report or the brief statement of the case as it appeared after investigation by the police. There is no substantial variation between the two. The learned lower appellate Court also seems to have taken this view in acquitting the petitioners of the charges under S. 394, Penal Code, but the question of legality of trial of the petitioners together on charges of distinct offences committed by each of them separately was not agitated before him, and that is the only reason why the point has not been dealt with in his judgment.

[10] On the facts as alleged in the early stage of the prosecution, the trial can be held legal on the only hypothesis that the offences by the accused persons were committed in course of the same transaction as provided in S. 239 (d), Criminal P. C. In order to judge whether it was in the course of the same transaction, I should here place before me what elements are there and what there are not. To start with, common purpose or common object shared by both the petitioners in commission of the offences is completely absent in the accusations. There is no allegation that there was any conspiracy between the petitioners to commit the offences. The only circumstance from which it is sought to be implied that the two petitioners must have proceeded on a common mission consists in that the two came towards the complainant one following the other. The allegation that they came from behind a bamboo-bush is a subsequent introduction. Apparently the place where the petitioners were found coming one following the other may be a place of their usual haunt. They might be coming in that direction either as mere companions without any illicit object shared by both or one might be coming independently of the other, it being purely a matter of accident that one was coming ahead and the other behind. The only elements on which the learned Advocate-General very strongly relies in order to spin out the sameness of the transaction are unity of time and place.

[11] It has been decided time and again that whether the offences are committed in course of the same transaction is to be judged from common sense point of view and no decision can be picked out, as it is not humanly possible in which it has been authoritatively intended to be laid down as to what the elements are that will make out one transaction. Authorities are not wanting in which it has been held that uniformity of time or place are not sufficient to make one transaction of the acts committed then and there. What I understand the section to mean is this, that there must be accomplishment of certain object or performance of certain act in view. In order that the different acts will make up one transaction, it must be inherent in them that from the very beginning of the earliest act or the first act, the other acts should either be in contemplation, or should from the very nature of the transaction in view form the component parts of one whole. Judged from this point of view, I hold that the assault by one and the theft by the other might have happened purely accidentally at the same time and place, but it is difficult to say, or to give a name to, what

the transaction was of which these two acts of offences formed component parts of a whole. In my judgment, therefore, the two offences were not committed in course of the same transaction.

[12] Several authorities have been cited by the learned counsel on each side to prove or disprove that the acts were committed in the course of the same transaction. None of them will help the solution of the difficulty. Each of them is an authority on the facts of that particular case. As they have been cited and discussed at great length at the Bar, I should briefly notice them one after the other. The learned Advocate-General has relied on the following cases: A. I. R. 1935 Cal. 312,[5] 60 Bom. 148,[6] A. I. R. 1942 Bom. 121[7] and A. I. R. 1935 Nag. 141.[8] In the first named case it was laid down:

"The word transaction means a group of facts so connected together as to involve certain ideas, namely, unity, continuity and connection. In order to determine whether a group of facts constitutes one transaction it is necessary to ascertain whether they are so connected together as to constitute a whole which can be properly described as a transaction."

This lends great support to the view that I have taken.

[13] In 60 Bom. 148[6] it has been said that:

"The word 'transaction' is rather a vague term. It is not defined in the Criminal Procedure Code and no doubt it is advisedly left undefined. It is not intended to be interpreted in any artificial or technical sense. Common sense and ordinary use of language must decide whether on the facts of a particular case, one is concerned with one transaction or several transactions. Various tests have been laid down to decide whether different acts are part of the same transaction. They are:— (1) proximity of time; (2) unity of place; (3) unity or community of purpose or design; and (4) continuity of action. But the main test must be continuity of action."

[14] This decision is far less in support of the learned Advocate-General's contention than that of what I have said before. Continuity of action, according to this decision is the main test. Continuity of action is not intended in the sense that one act must immediately follow the other without any other connection. Continuity refers not to the time so much as to the intimate connection between the acts. There is no continuity if after the completion of one act, there is nothing more to be done in order to make the thing done form one whole. If one act is complete by itself and has no connection with the other act which is done either simultaneously or immediately following the earlier one, it cannot be said that there is continuity of action.

[15] A. I. R. 1942 Bom. 121[7] has been relied upon in support of a contention that the test consists in whether the evidence to prove the different offences would be the same. On reading the case with care, I have not been able to accept this contention in the nude form in which it has been presented. In that case there was enough material on record to support that one was assisting the other in commission of the main offence of rape and the commission of theft was in that sense considered to be continuous one. The theft there can be conceived to have been committed in course of the same design. That this was not intended to be an absolute rule will be clear from the fact that the evidence of theft could not be the same as that of rape except when they are taken to be a continuous action. This authority, therefore, does not go far to help.

[16] A. I. R. 1935 Nag. 141[8] at p. 144 in deciding whether the offences were committed in the course of the same transaction has kept in view the different acts being the component parts of one whole. In fact the learned Advocate-General cited this before me when I expressed this idea in course of arguments by way of supporting my view. I, in fact, thank him for his frankness.

[17] A. I. R. 1931 Pat. 52[9] indicates that there must be continuity of action and purpose.

[18] Mr. Sahu has cited the case in A. I. R. 1931 Pat. 102[10] by way of replying to the learned Advocate-General's contention that unity of time and place are the best tests, as this case most emphatically lays down that the mere fact that different offences were committed at the same time and place are not enough to make them parts of the same transaction or to have been committed in the course of the same transaction. In this view I do not think that the authorities cited will convince me to change my view that the two offences committed by the two petitioners were not committed in the course of the same transaction. In my judgment the trial is bad on account of the misjoinder of persons accused.

[19] The only question that I have to determine is whether the petitioners should be subjected to a retrial. Stripped off all embelishments the offences committed are very simple and minor. Besides, the prosecution is guilty of improving upon the case as originally stated. The learned lower appellate Court has committed an error of record in saying that it was admitted by the defence that the prosecution witnesses were present at the occurrence. What was admitted was that the real occurrence of assault was on the field where the witnesses were present. The learned lower appellate Court does not feel confident about the prosecution case that the complainant had Rs. 230 in his possession. I do not think it is likely that he (complainant) should carry his pucca accounts from his shop to his house. I do not feel confident that on the evidence as it is, a conviction is more likely than not.

[20] Under the circumstances, I would give the petitioners the benefit of doubt and acquit them forthwith without subjecting them to a retrial. They will be discharged from their bail bonds forthwith.

D.S. —. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 127** *[C. N. 48.]*

SHEARER AND SINHA JJ.

*Atmakuru Rama Rao—Judgment-debtor—Appellant* v. *Atmakuru Rajeswar Rao and others—Decree-holders—Respondents.*

Appeal No. 77 of 1945, Decided on 1-5-1947, from original order of Sub-Judge, Berhampore, D/- 17-12-1945.

**Civil P. C. (1908), O. 34, Rr. 2, 4, 5 and 10 and O. 41, R. 35 — Costs in mortgage suits — General rule—Personal liability of judgment-debtor—Costs awarded in appellate decree.**

**Rule 35 of O. 41 must be read as subject to the provisions of O. 34 which make specific provisions as to costs in a suit on a mortgage ; whereas R. 35 speaks of a decree in appeal generally. Hence, the general rule in a mortgage action is that costs incurred by the mortgagee form part of the mortgage decree unless there is a specific direction that the whole or part of those costs shall be payable personally by some or other of the judgment-debtors. Though the words used in the decree of the appellate Court may lend themselves to the construction that the judgment-debtor was personally liable the real meaning must be found in the judgment and decree as interpreted in accordance with the rules of O. 34. The Court must be deemed to have intended what the law enjoins it to do as a general rule and the party, which contends that a departure from the general rule was intended, must clearly establish its contention from the words used in the judgment and in the decree following thereunder : 20 All. 523 (F. B.), *Rel. on* ; 3 A. I. R. 1916 Pat. 1, *Disting.* ; *Case law discussed.*** [Para 4]

**Annotation. — ('44-Com.) Civil P. C., O. 34, R. 2, N. 11, Pts. 2 and 3 ; O. 34, R. 4, N. 12, Pts. 1 to 3 ; O. 34, R. 5, N. 26, Pts. 1 and 2; O. 34, R. 10, N. 5, Pts. 1 to 3; O. 41, R. 35, N. 3.**

*Cases referred* :—

1. ('17) 2 Pat. L. J. 51 : 3 A. I. R. 1916 Pat. 1 : 38 I. C. 214, Matukdhari Singh v. Ramdas Singh.
2. ('98) 20 All. 523 (F. B.), Maqbul Fatima v. Lalta Prasad.
3. ('26) 13 A. I. R. 1926 All. 343 : 93 I. C. 223, Wahid Ali v. Durga Shankar.
4. ('31) 129 I. C. 554 : 18 A. I. R. 1931 All. 124, Lal Kannu Lal v. Bhagwandas.
5. ('08) 35 Cal. 431, Raj Kumar Singh v. Sheo Narayan.
6. ('25) 12 A. I. R. 1925 Cal. 1135 : 93 I. C. 364, Bahadur Singh v. Basiruddin Ahmmad.
7. ('19) 41 All. 473 : 6 A. I. R. 1919 All. 297: 50 I. C. 730, Amina Bibi v. Ramashankar Misra.
8. ('34) 21 A. I. R. 1934 All. 89 : 151 I. C. 294, Aziz Ahmad v. Riaz-ul Hasan.
9. ('26) 48 All. 682 : 13 A. I. R. 1926 All. 722 : 96 I. C. 592, Het Ram v. Raja Dutt Prasad Singh.

*M. S. Rao* — for Appellant.

*P. V. B. Rao* — for Respondents.

**Sinha J.** — This is an appeal from the decision of the learned Subordinate Judge of Berhampore, dated 17-12-1945, dismissing the appellant's objection under S. 47, Civil P. C.

[2] The facts leading upto this appeal lie within a very narrow compass, and may shortly be stated as follows : A mortgage suit for sale was instituted by the plaintiff-respondents against the appellant and other members of his family on the basis of a mortgage bond executed by his father as representing the family. The suit was decreed, and a first appeal, being First Appeal No. 6 of 1940, was preferred by the appellant only, the other members of the family being impleaded as *pro forma* respondents. During the pendency of the said appeal, the decree was made final on 23-12-1940. That decree was put into execution in E. P. No. 16 of 1941. For certain reasons, not necessary to be stated here, the said execution was stayed. The first appeal was heard and decided by this Court on 1-5-1943. This Court held that the decision of the trial Court that the mortgage bond was justified by legal necessity and was executed by the father when the family was in straitened circumstances justifying the alienation by the father was correct. In the result, the appeal was dismissed with costs. In the judgment of this Court, it is not stated that the costs of the appeal will be paid by the appellant personally. A decree was drawn up in the present case, the relevant portion of which is in these terms :

"It is ordered and decreed that this appeal be and the same is hereby dismissed with costs.

And it is further ordered and decreed that the appellant do pay to the respondents 1-4 the sum of rupees five hundred and thirty only as per details at foot being the amount of costs incurred by the latter in this Court."

[3] I have quoted the relevant portion of the decree in order to dispose of the argument advanced in the Court below and in this Court on behalf of the decree-holders. It may also be stated that the mortgagee-decree-holders did not make any attempt to have a fresh final decree prepared after the decision of the first appeal by this Court as aforesaid. But the decree-holders put the decree for costs prepared by this Court into execution in O. E. P. Suit No. 190 of 1945 on the footing that this was a simple money decree for payment of costs amounting to Rs. 530. This execution was taken out against the appellant only. The appellant filed an objection to the execution of the decree on several grounds, of which it is necessary only to notice the second objection which is to the effect that costs in a mortgage suit cannot be realised personally from one of the judgment-debtors in the absence of a specific direction in the decree to that effect, inasmuch as ordinarily costs in a mortgage suit must be realised from the sale of the mortgaged properties as a part of the mortgage decree. This objection was overruled by the learned Subordinate Judge on the ground that, in the circumstances of this case, the decree of the High Court

must be taken as having been passed personally against the appellant unless there was a specific direction that it would form part of the decree on the mortgage dues as also on the ground that the decree of the High Court was passed after the final mortgage-decree had been drawn up in pursuance of the preliminary decree by the trial Court. Hence, the executing Court was of the opinion that the decree-holders had a double remedy available to them, namely, either to proceed against the mortgaged property or against the appellant personally, and that the decree-holders were not restricted to their remedy against the mortgaged property only. The lower Court based its decision on the consideration that the ordinary rule is that an unsuccessful appellant must ordinarily pay the costs of the appeal, and that equity also demanded that the person who appealed from the decree should only bear the burden of the costs decreed by the appellate Court, especially in view of the fact that the appellant was the only defendant who preferred the appeal to the High Court, and got defeated in his attempt to get rid of the decree not only against himself but against his entire family. Hence this appeal.

[4] Apart from authorities, the provisions of O. 34, Rr. 2, 4, 5 and 10, Civil P. C., make it clear that, in a suit for foreclosure or sale, ordinarily costs of the suit and other costs, charges and expenses since after the preliminary decree up to the time of actual payment shall be added to the mortgage money, that is to say, not only the mortgage debt, principal plus interest, but also all the costs incurred in enforcing the mortgage shall form part of the mortgage decree realisable by sale, in case of a simple mortgage, of the mortgaged properties. That this is one of the rights of the mortgagee is made clear by R. 10 which provides for the exceptional cases in which the mortgagee may have deprived himself by his conduct of the benefit of those provisions. The personal remedy against the mortgagor is always available to the mortgagee provided that remedy is not barred by lapse of time. It is always open to the mortgagee to give up his higher rights under the mortgage, and to confine his claim to the personal remedy in respect of the mortgage money and interest due thereon as also for costs. Hence, in ordinary circumstances, the Code has provided the mortgagee with this additional advantage that he can claim the benefits of a secured creditor not only in respect of the mortgage debt but also in respect of costs incurred by him in enforcing the mortgage. But in the present case it appears, as was said at the Bar on behalf of the decree-holders, that the mortgage property is not sufficient to discharge the mortgage debt proper. It was also stated that the personal remedy, in addition to the mortgage rights which may be enforceable under R. 6 of O. 34 of the Code, is not available, as the suit had been instituted beyond six years of the due date of payment. Hence, naturally the decree-holders are anxious to execute the decree for costs of the appellate Court not as a part of the mortgage decree but as a simple money decree. But this remedy, in my opinion, is not available to the decree-holders unless they get a direction from the Court by way of an exception to the general rule that costs in the suit, including costs at the appellate stage, will form part of the mortgage decree. In other words, unless the decree-holders get a specific direction from the Court that the decree for costs would be payable personally by all or some of the judgment-debtors, as the case may be, the ordinary rule must prevail and the costs realised only as a part of the mortgage decree. Learned counsel for the respondents invited our attention to R. 35 (3) of O. 41, Civil P. C. Rule 35 makes a general provision as to the date and contents of the decree, and sub-r. (3) specifically provides that

"the decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid."

In my opinion, R. 35 must be read as subject to the provisions of O. 34 of the Code which make specific provisions as to costs in a suit on a mortgage; whereas R. 35 speaks of a decree in appeal generally. Hence, in my opinion, the general rule in a mortgage action is that costs incurred by the mortgagee form part of the mortgage decree unless there is a specific direction that the whole or a part of those costs shall be payable personally by some or other of the judgment-debtors. On the other hand, the decree-holders' contention is that, unless there is a specific provision that the decree for costs shall form part of the mortgage decree, the direction in the decree that so much is payable by way of costs of the suit or the appeal, and particularly of the latter, must have its ordinary meaning. There is no warrant for such a contention in the provisions of O. 34 of the Code, as referred to above. That being so, in my opinion, on principle, the appellant's contention that, there being no specific direction (as an exception to the general rule) that the judgment-debtor is personally liable for the costs of the appeal, those costs must form part of the mortgage-decree is correct. Hence, in this case, though the words used in the decree as prepared by this Court may lend themselves to the construction that the judgment-debtor was personally liable, the real meaning must be found in the judgment and decree as interpreted in accordance with the

rules of O. 34 of the Code, discussed above. The Court must be deemed to have intended what the law enjoins it to do as a general rule, and the party, which contends that a departure from the general rule was intended, must clearly establish its contention from the words used in the judgment and in the decree following thereunder. In this case, the judgment, as already indicated, is simply to the effect that the appeal was dismissed with costs, there being no indication in the judgment or even in the decree that the liability for payment of the costs decreed was a personal one.

[5] The decision of this Court in 2 Pat. L. J. 51[1] was in respect of the decree for costs in the suit on a mortgage, and a Division Bench of this Court held that in a mortgage decree for sale costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property, and not from the judgment-debtor, unless the decree makes such a specific provision, and that, in the absence of such a specific provision, there is no presumption that the decree entitled the decree-holder to proceed personally against the judgment-debtor. But that case is not exactly in point, as in that case there was no question of the decree for costs in the appellate Court. The leading case on the subject is the Full Bench decision of the Allahabad High Court in 20 ALL. 523.[2] In that case the preliminary decree was affirmed on appeal by the High Court, and in the decree drawn up by the High Court there was a direction that the defendant pay to the plaintiffs the amount of costs incurred in the Court of appeal. The decree-holders caused the mortgaged property to be sold, and the sale proceeds proving insufficient to liquidate all the dues on the mortgage, they applied for a money decree. But that application was dismissed. Subsequently, the decree-holders applied for execution of the decree as to costs personally against the judgment-debtor. The executing Court allowed the application for execution against the person of the judgment-debtor. On appeal, the Full Bench discussed the relevant provisions of the Code, and held that the clause in the decree directing the defendant to pay a certain sum to the plaintiffs was only a formal compliance with the provisions of the Code, and was never intended to be a direction for the recovery of costs personally from the judgment-debtor. Their Lordships further held that, if there was an ambiguity in the decree, it was the duty of the Court to construe those words in the decree by the light of the judgment. So construing the decree, their Lordships held that there was not the slightest indication in the judgment and the decree that the Court intended to award costs against the defendant personally. Though that decision was given under the old Code, it has been followed in later cases arising under the present Code of 1908. The Division Bench ruling of this Court, referred to above, has referred with approval to this decision. The decisions of the Allahabad High Court in A. I. R. 1926 ALL. 343[3] and of the same Court in 129 I. C. 554[4] are instances where the Full Bench decision, referred to above, was followed, and it was held that, in spite of the decree directing the payment of a certain sum of money by way of costs, there was no personal liability in the judgment-debtor to pay that sum. The Calcutta High Court in 35 Cal. 431[5] and A. I. R. 1925 Cal. 1135[6] has held that the costs awarded in a mortgage suit follow the character of the amount decreed in the suit, and form part of the entire decretal amount to be realised from the mortgaged property. All these decisions support the appellant's contention that he is not personally liable for the payment of the amount of costs decreed by the Court of appeal.

[6] On the other hand, learned counsel for the respondents very strongly relied upon the decision of a Division Bench of the Allahabad High Court in 41 ALL. 473.[7] That case, to a large extent, supports the respondents' contention that the decree must be taken at its face value, and, if there is a direction that the judgment-debtor should pay a certain sum of money by way of costs, such costs are realisable personally from the judgment-debtor. Walsh J. has made the following relevant observations at p. 475 :

> "There is nothing in this decree to indicate any special restriction upon the rights given to the decree-holders. The ordinary penalty of an unsuccessful appellant is that he must personally pay the costs of his appeal. There is no reason or principle why an exception should be made in favour of mortgagors."

But it would appear that the attention of their Lordships constituting the Division Bench which decided that case, was not drawn to the provisions of the Code of Civil Procedure referred to above, namely, Rr. 2, 4, 5 and 10 of O. 34 of the Code. Hence, those observations of their Lordships suffer from the infirmity that they do not take into consideration the special provisions of the Code relating to mortgage decrees. Another decision of their Lordships of the Allahabad High Court in A. I. R. 1934 ALL. 89[8] was also relied upon on behalf of the respondents. The decision bearing on this question is contained in the penultimate paragraph of the long judgment which dealt with other matters of greater importance. On the question of costs, their Lordships held in circumstances similar to those of the present case that the unsuccessful appellants, who were only some of the judgment-debtors were personally liable for the costs of the appel-

late Court. Though their Lordships make a reference to the general rule that ordinarily costs awarded to a mortgagee-decree-holder in a mortgage suit or appeal, in the absence of any express direction to the contrary, should form part of the mortgage decree realisable from the mortgaged property, they hold that the terms of the decree make the appellants personally liable. But this judgment also makes no reference to the previous decisions of the same Court to the contrary, particularly the Full Bench decision which is the leading case on the subject. Reference was also made to another decision of a Division Bench of the Allahabad High Court in 48 ALL. 682.[9] But that case concerned costs incurred in proceedings in execution of the final decree in a mortgage suit, and their Lordships held that such costs were not chargeable against the mortgaged property, but were payable by the judgment-debtor personally. They make a reference to the provisions of R. 10 of O. 34 of the Code; but they observe that R. 10 has nothing to do with the costs awarded in execution proceedings. That case, therefore, is not exactly in point.

[7] For the reasons given above, it must be held that the preponderance of judicial authority is in favour of the view I have taken on reference to the relevant provisions of the Code of Civil Procedure, and that the cases relied upon by the respondents are not of such compelling authority as to override those previous decisions; either they ignore the specific provisions of the Code of Civil Procedure bearing on the question or ignore the binding authority of the Full Bench decision. It must, therefore, be held that the decision of the learned Subordinate Judge is erroneous in law. The appeal is accordingly allowed, and the judgment-debtor's objection upheld. The execution against the person of the judgment-debtor cannot proceed. The appellant is entitled to his costs in this Court and in the Court below.

**Shearer J.**—I agree.

V.R. *Appeal allowed.*

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## A. I. R. (35) 1948 Patna 130 *[C. N. 49.]*

MANOHAR LALL AG. C. J. AND RAY J.

*Ram Chander Prasad and others — Appellants* v. *Sital Prasad and others — Respondents.*

A. F. A. D. Nos. 717 and 718 of 1944, Decided on 30-10-1946, from decision of Second Addl. Sub-Judge, Saran, D/- 28-1-1944.

**(a) Civil P. C. (1908), S. 11—Rent suit—Question of title in.**

In the rent suits filed by *A* against certain tenants, *B* intervened and was added as defendant second party and as such raised the contention that the deed of gift from *B* on which *A* based his title to recover rents in respect of the disputed tenancies was inoperative and was executed under undue influence. An issue was raised between the parties and it was held that the deed was executed under undue influence and remained inoperative not having been given effect to. In the subsequent title suit by *A* against *B*:

*Held*, that as the question of conflicting title as between *A* and *B* was raised in the rent suit and this conflict of title was directly and substantially in issue between them in order to decide the rent suit, the decision that the gift was inoperative as it was never given effect to, i. e., there was no divesting of the gifted property by the donor in favour of the donee operated as *res judicata*: *Case law discussed.* [Para 14]

**Annotation.—('44-Com.) C. P. C., S. 11, N. 14, Pt. 3.**

**(b) Transfer of Property Act (1882), S. 126—Gift—Undue influence — Presumption — Paramour and mistress—Gift of entire property by donor in favour of his only daughter's paramour — Contract Act (1872), S. 16.**

The donee was in illicit connection with the donor's only daughter and in view of this connection he had given up residing in his own house and was putting up with the donor and his daughter:

*Held* that (1) the daughter and, for the matter of that, her paramour, the donee, must be held to have been in a position to dominate the donor's will;

(2) the gift of the entire property to the donee by the donor ignoring his daughter and daughter's daughter made the transaction unconscionable;

(3) the above two circumstances conjointly made out the presumption that the gift deed was brought about under undue influence. [Para 15]

**Annotation.—('45-Com.) T. P. Act, S. 126, N. 9.**

**(c) Transfer of Property Act (1882), S. 122—Gift—Acceptance of—Inference as to—Possession of gift deed by donee.**

The acceptance of a gift has to be inferred not from the donee's present possession of the gift deed but from the fact of the deed having been handed over to him by the donor and his having accepted the same in token of the acceptance of the gift at the relevant time. Where the donee was living as an inmate of the donor's family being in league with the donor's daughter, it is quite possible for him to take hold of the document without the donor's knowledge and intention. [Para 16]

**Annotation.—('45-Com.) T. P. Act, S. 122, N. 7.**

*Cases referred*:—

1. ('77) 3 Cal. 145 (F.B.), Gobind Chunder v. Taruck Chunder.
2. ('13) 15 Beng. L. R. 238 (F. B.), Hurri Sunkur v. Muktaram Patro.
3. ('36) 23 A. I. R. 1936 Pat. 556 : 165 I. C. 623, Pirthi Singh v. Ramsaran Mahto.
4. ('35) 22 A. I. R. 1935 Pat. 526 : 158 I. C. 734, Hari Mahton v. Saheb Lal.
5. ('34) 21 A. I. R. 1934 Pat. 282 : 147 I. C. 1055, Fazilat Hussain v. Ramkhelawan Koeri.
6. ('33) 20 A. I. R. 1933 Cal. 824 : 147 I. C. 481, Akhil Chandra v. Ramani Ranjan.
7. ('26) 43 C. L. J. 146 : 13 A. I. R. 1926 Cal. 650 : 94 I. C. 837, Gnanada Gobindo v. Nalini Bala Debi.

*Jaleshwar Prasad* — for Appellants.
*Phulan Prasad* — for Respondents.

**Ray J.**—The appeals have been heard together and they will be governed by this judgment. The second Appeal No. 717 has been preferred by Munshi Ram Chander Prasad, defendant 1, impleading defendants 2, 3 and 4 as respondents. This relates to Title Suit No. 160/30 of 1939/1941

in the Court of the Additional Munsif, Gopalganj. The second Appeal No. 718 has been preferred by Mangla Prasad, uncle and heir of Bacha Babu, defendant 1 and Jai Narain Pandey, defendant 2, impleading defendants 3 and 4 as respondents and relates to Title Suit No. 186/31 of 1939/1941 of the Court of the Additional Munsif, Gopalganj. The two suits, 160/30 and 186/31, hereinafter referred to as suits 160 and 186 respectively, were filed under the provisions of O. 21, R. 103, Civil P. C. Title Suit No. 160 arose out of Miscellaneous Cases Nos. 174 and 175 and Title Suit 186 arose out of Miscellaneous Case No. 173. Lala Sital Prasad is the common plaintiff in both the suits in which he sought to set aside the orders passed in the abovenamed miscellaneous cases and to have his title declared in respect of the disputed properties and his possession either confirmed or restored.

[2] The history behind these litigations is shortly as follows: The plaintiff, Sital Prasad, filed Rent Suit No. 57 of 1933 against one Akloo Bhar and Rent Suit No. 38 of 1933 against Harangi and Barho. Akloo held two tenancies, one *sikmi* and the other occupancy. The *sikmi* tenancy consists of Sikmi Khata No. 2 in village Ratanpura, and the occupancy in Khata No. 95 in village Belwar. These two tenancies held under one consolidated rental at an annual jama of Rs. 9-4-6 were recorded within the mokarrari of Mathura Prasad and Jasoda Nandan Prasad. Rent suit No. 38 was in respect of a holding comprised in Khata No. 63 in village Barachap. This holding similarly appertained to the estate of Mathura Prasad and Jasoda Nandan Prasad. It is alleged that there was a partition between Mathura Prasad and his nephew Jasoda Nandan Prasad by virtue of which the tenure relating to the tenancies in suit fell to the share of Mathura Prasad. Mathura Prasad, it is alleged, gifted away all his properties to the plaintiff, Sital Prasad, and on the strength of this title, he claimed to recover the rent in respect of the disputed holdings. Both these suits along with a number of other suits were tried together and Sital Prasad obtained decrees. In execution of the decrees, Sital brought the disputed three holdings to sale and himself became the auction-purchaser. He took out dakhaldehani on 30-4-1938, whereupon Ram Chander Prasad, son of Jasoda Nandan Prasad and nephew of Mathura Prasad, filed an objection in respect of the holdings Nos. 95 and 63 on the allegation that they had been abandoned by their holders in favour of Mathura Prasad, and that on the death of Mathura Prasad, Jasoda Nandan and after him Ram Chander was in possession. Chandershekhar and Jai Narain filed objections under O. 21. R. 100, Civil P. C. claiming possession over Sikmi Khata No. 2 as purchasers at a sale held in execution of a certificate issued against Ram Chander Prasad, son of Jasoda Nandan. The miscellaneous cases were decided in favour of the claimants. Hence, Sital Prasad, the decree-holder, filed the suits, as already stated. Second Appeal No. 717 is in respect to the two occupancy khatas preferred by Ram Chander Prasad and S. A. No. 718 is by Jai Narain Pandey and Mangla Prasad.

[3] The plaintiff-respondent bases his title on the deed of gift from Mathura Prasad, while Ram Chander claims it on the basis that his father and after him he himself was in possession of the properties as heir or survivor of Mathura Prasad.

[4] Both the Courts below have found the deed of gift of Mathura Prasad in favour of the plaintiff to be a genuine, valid and operative document, and on this finding they have decreed the suit. Hence, these second appeals.

[5] The learned counsel for the appellants has raised two contentions, namely, (1) that the findings of the learned Courts below are inadequate to support the conclusion in favour of the gift inasmuch as they have not come to any finding as to whether Mathura Prasad had intended to, and did in fact divest himself of title to the properties in suit, and (2) that the issue is barred by *res judicata*.

[6] The issue of *res judicata* is based upon the decision, in Rent Suits filed by Sital Prasad against certain tenants in respect of tenancies including the one which was the subject-matter of Rent Suit No. 38 and Ram Chander Prasad intervened in all the suits and was added as defendant 2nd party, and as such raised the contention that the deed of gift on which Sital Prasad based his title to recover rents in respect of the disputed tenancies was an inoperative document and had been executed under undue influence. An issue was raised between the parties on the point, and it was held that the deed of gift had been executed under undue influence and remained inoperative not having been ever given effect to. With regard to the first contention, it is urged in reply that it is no longer open to the appellant in second appeal having been concluded by concurrent findings of fact of both the Courts below, and with regard to the contention regarding *res judicata*, it is urged that the decision in the rent suit was only incidental and should not operate as *res judicata*.

[7] The learned trial Court has dealt with the contention of *res judicata* in the following manner. He observes:

"I should point out that all the Judges who had occasions to deal with this question of the validity of the deed of gift have unequivocally expressed them-

selves in clearest possible language that their decision on the point will not be final and conclusive between the parties as they were examining the point only incidentally. They have gone to the length of observing that the parties will be free to agitate the matter of title again. I should like to reproduce the observations of Babu Shiva Kumar Prasad, Additional Munsif, who tried the batch of 13 rent suits and upon whose judgment the learned pleader for the defendants relied for the application of the principle of *res judicata* to the facts of this case. The observations are quoted here from his judgment at page 3 against Point No. 1. 'It must be conceded at the very outset that it is outside the scope of these suits to decide about the genuineness or otherwise of this deed of gift and the question will only be gone into incidentally simply to ascertain whether the plaintiff has been in possession of the properties covered by it . . . .' It is abundantly clear from these remarks of the learned trial Court made at the beginning of his findings that the matter was investigated only incidentally and hence, in my opinion, the rule of *res judicata* cannot bar the present title suit."

[8] The learned lower appellate Court in dismissing the contention of *res judicata* adopted the same line of argument as the learned Munsif. He observed:

"From the judgments in the two batches of rent suits it appears that the Courts examined the question of title on the basis of the deed of gift incidentally, and came to adverse findings in respect of the deed of gift. Reading the judgments on the point, it does not appear that any specific issue with respect to the deed of gift was ever raised or decided directly and substantially."

He then referred to certain decisions of this Court and of the Calcutta High Court in which it had been held that a question of title decided in rent suits in which the question of relationship of landlord and tenant is the very foundation of the decree, operates as *res judicata*, and then says:

"The point to be clearly borne in mind, however, is that in none of the proceedings referred to above, the Court meant to decide the question of title on the basis of the deed of gift directly and substantially as against respondent 1. I am, thus, of opinion that the title of respondent 1 could not be held to stand defeated on the ground of *res judicata*."

I have examined all the authorities cited by the learned Court of appeal below and those cited at the Bar, and I propose to deal with them one after another in the following paragraphs.

[9] In 3 Cal. 145[1] which was decided by a Bench consisting of five Judges including Sir Richard Garth C. J. the facts were that in a previous suit instituted by one of the present defendants against the tenant for rent, one of the present plaintiffs (representing the right now claimed by all of them) intervened as a defendant, on the ground that he was the person entitled to the rent, and failed to establish his claim. It was held, following the Full Bench case in 15 Beng. L. R. 238[2] that the plaintiffs in the later suit were barred by the judgment in the former suit, and once it is made clear that the self-same right and title is substantially in issue in two suits, the precise form in which either suit was brought or the fact that the plaintiff in the one case was the defendant in the other became immaterial. In this case the decision of an issue in a suit for rent was considered to bar the determination of the same issue in a regular title suit by the principle of *res judicata*.

[10] In A. I. R. 1936 Pat. 556[3] it was held by James and Rowland JJ. that the relationship of landlord and tenant is the very foundation of a decree in a suit for rent and therefore when such a suit has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. It cannot be relegated to the category of matters only indirectly, collaterally and incidentally decided. This principle is true even if the decree passed is an ex parte one. This decision, in its implication, is confined to rent suits though rent suits as such have no reference to the facts.

[11] In A. I. R. 1935 Pat. 526[4] the facts were that in a suit for rent, the plaintiff claimed to be entitled to a two annas and eight pies share. The Court basing the decision on an entry in a register, however, held that he was entitled to only two annas share. In a subsequent suit for rent against the same defendants, the plaintiff again claimed rent as owner of two annas eight pies share. It was contended that the decision in previous suit did not operate as *res judicata* to the issue in the later suit, as the question of share of the plaintiff was not finally decided in previous suit, the decision being based entirely on the entry in the register. It was held by James J. that the decision was necessary for the purposes of that suit, and that the question was directly and substantially in issue between the parties. Hence the previous decision operated as *res judicata*.

[12] To the same effect is the decision of James J. in the case in A. I. R. 1934 Pat. 282[5] where it is said:

"Where in a rent suit the parties went to trial on the issue of the ownership of the house, and where the issue was decided and where probably the case was tried as a regular suit in order that the question of title might be decided, the question is barred by *res judicata*."

[13] In A. I. R. 1933 Cal. 824[6] it was held that in a rent suit where there is a dispute as to question of title as between the co-sharer-landlords, the tenants denying the plaintiffs' title, and pleading that the other co-sharer was the full owner, and the other co-sharer supporting their defence, it was held that the Court was justified in deciding the question of title and the decree was not vitiated.

[14] In support of an opposite contention, reliance has been placed upon the case in 43 C.L.J. 146.[7] This decision is to the effect that where the

relationship of landlord and tenant as between the parties in a rent suit has been decided with reference to the period in suit, it should not operate as *res judicata* in a suit for rent for a different period, but if the issue has been decided generally, and for all times or once for all, it would be *res judicata* in respect of any suit for a subsequent period. In the present case, there is nothing that can support the contention that the question of relationship was determined with regard to the period in suit. In this case too the question of conflicting title as between Sital, and the son of Jasoda Nandan was raised both by the intervening defendant as well as by the tenant, and this conflict of title, as between them, was directly and substantially in issue in order to decide the rent suit, and the Court that heard the rent suit and finally decided it is competent to try this subsequent suit. I see, therefore, no reason why the decision should not operate as *res judicata* between the parties. The learned Courts below have made to rest their decision upon the word "incidentally" used by the Rent Court in holding that the Court left the matter open to be tried out in a regular suit. I do not think it is really so. The Rent Court in using the word "incidentally" tried to distinguish between genuineness of the gift deed and its operative character. He assumed, for the sake of that suit, that the gift was genuine but held that even though it was genuine, it was not given effect to by the parties. So far, the fact of genuineness, that is, the fact of execution by Mathura Prasad is not in dispute. What is in dispute is that it was never given effect to, or, in other words, there was never any divesting of the gift properties in favour of the donee. In my view, if this finding is held to operate as a bar of *res judicata*, it will be quite sufficient to dismiss the plaintiff's suit.

[15] Besides, the learned Courts below have misdirected themselves in disposing of the point raised, namely, that the deed of gift was executed under undue influence. It has been found as a fact by both the Courts below that Sital was in illicit connection with the donor's only daughter and only issue then living, and, in view of this connection, he had given up residing in his own house and was putting up with Mathura and his daughter. The daughter under the circumstances and, for the matter of that, her paramour Sital must be held to have been in a position to dominate his will. Furthermore, the giving away of the entire property in favour of Sital ignoring his daughter and the daughter's daughter makes the transaction unconscionable. These two circumstances conjointly make out a presumption that this document must be held *prima facie* to have been brought about under undue influence. The plaintiff has done nothing, according to the findings of the Courts below, to dispel this presumption.

[16] With regard to the acceptance of the gift by Sital, evidenced as it is by his possession of the deed of gift can also be said not to have been satisfactorily disposed of by the learned Courts below. The acceptance is to be inferred, not from his present possession of the deed, but from the fact of the deed having been handed over to him by the donor and his having accepted the same in token of the acceptance of the gift at the relevant time and this is the fact which is relevant for the purpose. Keeping in view the circumstances that Sital was living as an inmate of the family being in league with Mathura's daughter, it was quite possible for him to take hold of the document without the donor's knowledge and intention. In the absence of the donor, it is difficult for the appellant to prove how possession of the deed was secured by Sital.

[17] In any view, I have no hesitation in holding that the present suits are barred by *res judicata*. These appeals, therefore, succeed and must be allowed with costs.

**Manohar Lall, Ag. C. J.**—I agree.

G.N. *Appeals allowed.*

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## A. I. R. (35) 1948 Patna 133 [C. N. 50.]

RAY J.

*Upendra Prosad Padhi and another* — *Appellants* v. *Sri Sri Akhandaleswar Mahadeb and others* — *Respondents.*

A. F. A. D. No. 125 of 1943, Decided on 18-11-1946, from decision of Dist. Judge, Cuttack, D/- 22-6-1943.

**(a) Orissa Hindu Religious Endowments Act (4 [IV] of 1939), Ss. 27 (4), 57 — Scheme under S. 92, Civil P. C.—Members of committee appointed as life members—Effect of Ss. 27 and 57.**

If in the scheme formed under S. 92, Civil P. C., by the District Judge, he has appointed the members of the committee as life members, their tenure of office cannot come to an end in view of S 57, Orissa Hindu Religious Endowments Act even though it is inconsistent with the provisions of S. 27 (4) of that Act. Therefore, they shall be deemed to have been in office until the scheme is modified or cancelled in the manner provided by that Act. [Para 2]

**(b) Orissa Hindu Religious Endowments Act (4 [IV] of 1939), S. 54—Scope and applicability—Members of committee appointed under scheme under S. 92, Civil P. C., if require previous consent by Commissioner.**

Section 54 does not apply to existing trustees. The section does not make any distinction between hereditary trustees and non-hereditary trustees. The section read as a whole is meant to replace Ss. 92 and 93, Civil P. C. The provision is enabling and at the same time is not exhaustive. It cannot be said that it is only those persons who have been mentioned or referred to in S. 54 and under circumstances defined there-

in, can maintain a suit and nobody else. The members of the committee appointed under a scheme framed under S. 92, Civil P. C., do not, therefore, fall within the category of persons having interest and having had to obtain previous consent within the ambit of S. 54 of the Act. [Para 3]

*U. N Rath* — for Appellants.

*P. Mahanty* — for Respondents.

**Judgment.** — This second appeal is by the defendants in a suit for recovery of certain gifts (presents) made by devotees to Sri Sri Akhandaleswar Mahadeb whose endowment is under the management of the committee constituted by the plaintiffs 1, 2 and 3

[2] The only point that has been discussed in second appeal is that in view of certain provisions of law to be mentioned presently, the plaintiffs have no locus standi to bring the suit, nor is it maintainable. The sections relied upon are Ss. 27 (4), 57, 54 and 5 (2), Orissa Hindu Religious Endowments Act (4 [IV] of 1939). Admittedly, plaintiffs 1, 2 and 3 are members of a committee appointed under a scheme framed under S. 92, Civil P. C., by the District Judge of Cuttack. It is argued that non-hereditary trustees as they are, their office by virtue of their previous appointment enures only for one year from the date of the commencement of the Orissa Hindu Religious Endowments Act. The Act commenced on 4-11-1939, and, therefore, they cannot be considered to be in office after 4-11-1940, and thus they are not entitled to maintain the present suit which was filed in the month of May 1941. Secondly, it is argued that they either as trustees or as members of the public having interest in the endowment could not maintain a suit to recover possession of properties as the disputed properties are comprised in a Hindu Religious Endowment without consent of the Commissioner. Even considered as a proceeding pending at the commencement of this Act, it is valid only so far as it is not inconsistent with the provisions of this Act. This last argument was, however, abandoned when it was pointed out to the learned advocate appearing for the appellant that the continuing scheme under S. 92 does not amount to a proceeding. If the sections 27 and 54 stood alone, the appellants should certainly have been entitled to succeed. But S. 57 operates to nullify the effects of the aforesaid sections to a very large extent. Section 57 reads as follows :

"Where the administration of a religious endowment is governed by any scheme settled under S. 92, Civil P. C., 1908, such scheme shall, notwithstanding any provisions of this Act which may be inconsistent with the provisions of such scheme, be deemed to be a scheme settled under this Act, and such scheme may be modified or cancelled in the manner provided by this Act."

If in the scheme framed under S. 92, Civil P. C. by the District Judge he appointed the members of the committee as life members—as it is admitted that they have been so appointed—their tenure of office cannot come to an end even though it is inconsistent with the provisions of S. 27 (4). Therefore, they shall be deemed to have been in office until the scheme is modified or cancelled in the manner provided by this Act.

[3] The next question that arises is whether as members of the committee they can maintain the suit without having obtained the consent of the Commissioner. There are two answers to this contention. The first is that the members of the committee having had the right to institute suits to recover properties from the hands of either trespassers or persons claiming on their own behalf, some sort of right to the custody of the endowment properties, this right will continue to lie in them notwithstanding anything in the provisions of S. 54 to the contrary. The second answer is that S. 54 does not appear to apply to existing trustees. The section does not make any distinction between hereditary trustees and non-hereditary trustees. The extravagance of the contention can be exposed by taking a small but right illustration into consideration. Suppose, the hereditary trustee of a Math has, in course of his management of the Math properties, to institute suits for recovery of endowment properties either from the hands of trespassers or from the hands of one who claims to have superior right as Mahanth of the Math. Is it at all necessary that in order to maintain such a suit he will have to obtain the previous consent of the Commissioner ? The answer to this question must be in the negative. The section is framed so as to confer certain new rights upon certain persons who otherwise have not got them, to institute suits for the benefit or in the interest of endowments. The section read as a whole is meant to replace Ss. 92 and 93, Civil P. C. The provision is enabling and at the same time is not exhaustive. It cannot be said that it is only those persons who have been mentioned or referred to in S. 54 and under circumstances defined therein can maintain a suit and nobody else It is the common law that whenever any property is vested in any individual, he either as owner or as possessor or as manager of such properties has a right to maintain actions for preservation, restoration or due upkeep of the said properties. If any law of any Legislature is meant to take away such a right, the provision contemplating to take them away must be very clear, unambiguous and express. In my judgment, members of the committee do not fall within the category of persons having interest and having had to obtain previous consent within the ambits of S. 54 of the Act. It

has also been argued by Mr. Mahanty appearing for the respondents that this is not a suit for recovery of possession of property comprised in a religious endowment. He contends that this is a property which is acquired from time to time by daily administration of the endowment and it cannot be said to be included within the very wide words "property comprised in a religious endowment" occurring in S. 54 (1) (a). I do not feel the necessity of expressing any opinion on this last argument advanced by him.

[4] In the result, I find no substance in the contention in support of pleas in bar of the plaintiffs' suit. In my judgment, the members of the committee have got a right of maintaining the suit without any consent from the Commissioner, and they are entitled to continue in the office until the Commissioner, in exercise of his powers under the Act and in accordance with the last part of S. 57 of the Act, removes them or limits their tenure in any possible way. In this view of the matter, the appeal fails and is dismissed with costs.

S. C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 135** *[C. N. 51.]*

FULL BENCH

AGARWALA AG. C. J., REUBEN AND BENNETT JJ.

*Murat Patwa — Petitioner* v. *Province of Bihar—Opposite Party.*

Criminal Misc. Case No. 194 of 1947, Decided on 22-9-1947.

**(a) Bihar Maintenance of Public Order Act (5 [V] of 1947), S. 4—"As soon as may be", meaning of—Onus—What is reasonable time.**

The phrase "as soon as may be" as used in S. 4 of the Act means as early as is reasonable in the circumstances of the particular case. It should ordinarily be possible to communicate the grounds to a detenu within a comparatively short period of time and that after the lapse of such a period the onus will shift to the authority in question to show that the grounds were served as soon as was reasonable. No particular period can be indicated as being sufficient to shift the onus of proof. The circumstances will obviously differ to a substantial extent What is reasonable in one set of circumstances may be quite unreasonable in another. [Para 12]

Where the order under S. 2 (1) (a) of the Act was issued against a person on 16th April 1947, the person was arrested thereunder on 9th May 1947, but the grounds of his detention were not communicated to him until 24th July 1947 :

*Held* that the authority concerned did not comply with the provisions of S. 4 of the Act. [Para 12]

**(b) Bihar Maintenance of Public Order Act (5 [V] of 1947), S. 4 — Section is mandatory — Non-compliance with—Effect.**

The provisions of S. 4 are mandatory and absolute. [Para 14]

The Act is not primarily concerned with orders but with the preventive detention of persons whose detention the Provincial Government is satisfied is necessary with a view to prevent them from acting in any manner prejudicial to the public safety and maintenance of public order. The order made under S. 2 (1) (a) is mere machinery through which the object of the Act, namely, the detention of the person concerned, is carried out and, it is that detention which becomes illegal if the grounds for his detention are not communicated to the detenu within a reasonable time as provided in S. 4. It is unnecessary to infer any intention on the part of the Legislature that the order issued under S. 2 (1) (a) should be avoided *ab initio*. [Para 25]

*Cases referred* :—

1. ('44) 23 Pat. 252 : 31 A. I. R. 1944 Pat. 354, Kamla Kant v. Emperor.
2. (1853-54) 8 Moo. P. C. 203 (P.C.), The Queen v. William Nicholas Price.
3. 207 Fed. 757, John B. Stevens & Co. v. Ins. Co.
4. (1825) 3 B. & C. 658, Spenceley v. Robinson.
5. (1841) 10 L. J. Com. Law 241, Thompson v. Gibson.
6. (1842) 10 M. & W. 688 : 12 L. J. Ex. 86, Christie v. Richardson.
7. (1846) 9 Q. B. 684 : 16 L. J. M. C. 31, Tennant v. Bell.
8. (1884) 9 A. C. 757, Justices of the Peace for Middlesex v. The Queen.
9. (1861) 30 L. J. Ch. 379 : 3 L. T. 494 : 9 W. R. 292, Liverpool Borough Bank v. Turner.
10. (1926) 1926 A. C. 619 : 95 L. J. Ch. 457 : 135 L. T. 514, Salford Guardians v. Dewhurst.
11. (1881) 6 Q. B. D. 376, R. W. Enraght's case.

*B. C. Ghosh*—for Petitioner.

*Government Advocate*—for Opposite Party.

**Order.**—The questions raised in this reference are as to the construction and effect of S. 4, Bihar Maintenance of Public Order Act, 1947, which we shall hereinafter refer to as "the Act".

[2] The reference to this Full Bench arises out of an application under S. 491, Criminal P. C., by one Murat Patwa, who claims that he is being illegally and improperly detained in the Bihar subjail.

[3] The applicant was originally arrested by the Sub-Inspector of Police, Bihar P. S. on 5th March 1947, but it appears that no authority for this arrest came into existence until 12th March 1947, when the District Magistrate, Patna, purporting to act in pursuance of the powers conferred upon him by sub-s. (2) of S. 2 of the Act passed an order directing that he be detained for fifteen days. On the day after the expiration of that order, namely, 28th March, the applicant moved this Court under S. 491, Criminal P. C., and a rule was issued which was made returnable on 3rd April 1947. On the latter date, a Division Bench of this Court made this rule absolute and, inter alia, passed the following order :

"An order shall issue at once, that if the petitioner has not been released, he must be released without further delay . . . ."

It appears, however, that the petitioner was not released until 10th April 1947, and then only upon his furnishing bail to an amount of Rs. 1000 with two sureties of like amount to come up and appear in respect of charges that were said to be pending against him in the Court of the Sub-

divisional Magistrate, Bihar, in Criminal Case No. 40 (2) of 1947. On 16th April 1947, the Provincial Government passed an order under S. 2 (1) of the Act for the detention of the applicant until further orders. The applicant appeared before the Subdivisional Magistrate, Bihar, in Criminal Case No. 40 (2) of 1947, on 9th May 1947, and he was then arrested and detained in pursuance of the order of 16th April 1947. The application now before us was filed on 3rd June 1947 and came before a Division Bench of this Court on 5th June 1947. On 10th June 1947 an order which is dated 16th April 1947, was served upon the applicant which purported in pursuance of S. 4 of the Act to communicate to the applicant the grounds for his detention and which is in the following form :

"Government of Bihar,
Political Department,
Special Section.

Order No. 1560C. Patna, the 16th April, 1947.

In pursuance of section 4 of the Bihar Maintenance of Public Order Act, 1947 (Bihar Act V of 1947) Murat Patwa son of Tulsi Ram of Mahalla Alinagar, P. S. Bihar, Patna is informed that the grounds for his detention are—

that he was acting in a manner calculated to inflame communal passions which act is prejudicial to the public safety and the maintenance of the public order.

2. Murat Patwa is informed that he has a right to make a representation in writing against the order under which he is detained. If he wishes to make such representation he should address it to the undersigned and forward it through the Superintendent of the Jail as soon as possible.

Sd. Illegible.
Joint Secretary to Government."

The matter next came before the vacation Bench on 18th June 1947, when on the application of counsel for the applicant it was adjourned until 16th July 1947. On 21st July 1947, the application came before a Division Bench of this Court consisting of Bennett and Ramaswami JJ. and it being disputed whether the grounds for the applicant's detention had been communicated to him and there being no evidence thereon before the Court, the hearing was adjourned till 28th July 1947, to enable the Crown by a further affidavit to show that the grounds had been communicated to the applicant and, if so, the date of such communication to the applicant and to produce a copy thereof. At the further hearing on 28th July 1947, an affidavit was filed on behalf of the Crown purporting to have been sworn by the sub-jail clerk of Bihar. In regard to this affidavit, we agree with the comments made by Bennett J. in the following extract from his order making this reference :

"From the contents of this affidavit it might be imagined that this sub-jail clerk was a Secretary to Government. In para 1 of the affidavit he states that he is acquainted with the facts of the case. In paras. 2 and 4 thereof he relates the reasons for arrest and detention of the applicant. In para 3 he swears to a report made by the Sub-Inspector of Bihar to the Sub-divisional Magistrate, Bihar. In para. 5 he sets out in detail the report dated 7th March 1947, made by the Deputy Superintendent of Police, Bihar to the Sub-divisional Magistrate, Bihar. In para. 6 he states :

"That the case of Murat Patwa was through proper channel placed before the Government and on 16-4-1947 the order of detention was passed and on the same date notice under S. 4, Bihar Maintenance of Public Order Act (5 [V] of 1947) was directed to be served." In Para 9 he states : 'that subsequently the Government issued another notice on 17-7-1947, on Murat Patwa giving more details as to the cause of his detention and has been sent to the Sub-divisional Officer for service;' and finally in Para. 10 he states that all these facts are true to his knowledge. It was no doubt very candid of the Crown to endeavour to put the Court in possession of these facts, but the advisers of the Crown incur a grave responsibility when they allow a subordinate official to swear to the truth to his knowledge of facts the truth or otherwise of which he obviously can know only by hearsay. The Courts cannot treat lightly the fact that, albeit in good faith, an affidavit has been put before it in which a person swears to his knowledge of the truth of facts of which he obviously has no personal knowledge. The only facts in his affidavit which the deponent prima facie could properly swear to were those set out in paras. 7 and 8 thereof, namely, that the order dated 16-4-1947, above set out was served by the deponent upon the applicant on 10-6-1947."

[4] At the hearing on 28-7-1947, the learned Government Advocate produced an order dated 17-7-1947, which on the face of it is acknowledged by the applicant as having been served upon him on 24-7-1947. This order is in the following terms.

"Government of Bihar,
Political Department
(Special Section).
Ranchi, 17-7-1947.

Order No. 5222C. In pursuance of S. 4, Bihar Maintenance of Public Order Act, 1947, Murat Patwa, son of Tulsi Ram of Mohalla Alinagar, Bihar P. S. Patna, is informed that the grounds for his detention are that—

There are reasons to believe that he took part in the last communal disturbances in Mohalla Alinagar of Bihar town and removed door frames, door shutters etc. of the evacuated houses of Muslims. In the circumstances the Provincial Government are satisfied that if allowed to remain at large, he should indulge in communal activities to the prejudice of public safety and the maintenance of the public order.

2. Murat Patwa is informed that he has a right to make a representation against the order under which he is detained. If he wishes to make such a representation he should address it to the undersigned and forward it through the Superintendent of Jail as soon as possible.

3. Government Order No. 1560C, dated 16-4-1947 is cancelled.

Sd. Illegible
Joint Secretary to Government."

[5] The material provisions of the Act for the purposes of this reference are the preamble and Ss. 1 (3), 2 (1) (a), 2 (2), 2 (5), 3 and 4. The relevant portion of the preamble reads as follows:

"Whereas it is expedient to provide for preventive detention, imposition of collective fines, control of meetings and processions, imposition of censorship, requisitioning of property and prevention of unlawful drilling and the

wearing of unofficial uniforms in connection with the public safety and maintenance of order in the Province of Bihar."

And it is, therefore, clear that the Provincial Legislature in passing the Act were purporting to exercise the powers conferred upon them by S. 100 (2) and, Item 1 of list 11 in Sch. 7, Government of India Act, 1935.

[6] Section 1 (3) provides:

"This Act .... shall remain in force for a period of one year from the date of its commencement."

And this sub-section read with the Preamble shows that the Act is in the nature of emergency legislation.

[7] Sections 2 (1) (a), 2 (2), 2 (5), 3 and 4 provide:

"2. *(1)* (a) The Provincial Government if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, may make an order directing that he be detained.

* * * *

*(2).* A District Magistrate may exercise the power conferred by cl. (a) of sub-s. (1) and an order so made by him shall be valid for a period not exceeding fifteen days.

* * * *

*(5).* So long as there is in force in respect of any person such an order as aforesaid directing that he be detained he shall be liable to be removed to and detained in such place and under such conditions, including conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Provincial Government may from time to time by general or special order specify.

* * * *

3. An order made under S. 2 shall be in force for a period not exceeding six months from the date on which it is made unless earlier revoked by the authority making the order.

Provided that any such revocation shall not prevent the making under S. 2 of a fresh order to the same effect as the order revoked.

4. Where an order is made in respect of any person under cl. (a) of sub-s. (1) of S. 2, as soon as may be after the order is made, the authority making the order shall communicate to the person affected thereby so far as such communication can be made without disclosing facts which the said authority considers it would be against the public interest to disclose the grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make if he wishes a representation against the order and such person may at any time thereafter make a representation in writing to such authority against the order and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest practical opportunity of doing so."

[8] Bennett and Ramaswami JJ., were of opinion that it was conclusively established that the authority making the order had failed to comply with the provisions of S. 4 of the Act, that these provisions were mandatory and that therefore non-compliance therewith rendered illegal the continued detention of the applicant. In view, however, of two recent decisions of a Division Bench of this Court in Criminal Miscellaneous Cases Nos. 123 and 125 of 1947 to the contrary effect they referred the points of law to a Full Bench.

[9] In Criminal Miscellaneous Case No. 123 of 1947 the material part of the judgment of Ray J. with whom Reuben J. concurred, reads as follows:

"The last contention of the learned counsel is based upon S. 4 of the Ordinance. In this connection his submission is that the order of detention is invalid inasmuch as the requirements of S. 4, in the Provincial Government failing to reach the detenu the grounds of his detention, have not been complied with. This contention is wholly fallacious. The very text of the section indicates that these grounds are to be intimated to a detenu after the order is passed and the object of furnishing of such grounds is to enable him to make a representation in writing to the authorities against the order. Therefore, there is no room for doubt that the order is neither invalid nor invalidated on account of non-compliance of the provisions of S. 4; but at the same time it is not ignorable in this particular case that the executive authorities have not paid sufficient attention to the provisions of S. 4. Section 4 very clearly requires that the authority making the order shall communicate to the person affected thereby so far as such communication can be made, without disclosing facts which the said authority considers it would be against the public interest to disclose the grounds on which the order has been made against him, and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes a representation against the order. Bearing in mind that legislation of the kind which we are dealing with in this case is an inroad upon the liberty of a subject the section aims at giving the person ordered to be detained an opportunity to clarify the charges against him with the hope that he may disabuse the appropriate authority of the prejudicial opinion against him. Suppose, in any particular case a detenue is able to satisfy the authority concerned that at all relevant times he was far away from the particular locality in relation to which his activities have been considered objectionable and are sought to be restrained. Under such circumstances the authority will, in all likelihood, be glad to release him. Under the circumstances it is never the intention of the Legislature in enacting the section that communication of the order of detention and the ground and such other particulars as are sufficient to enable him to make a representation should be withheld from him for any length of time. It may not be practicable in every case to communicate the grounds and the particulars along with the order of detention but that does not mean that it can be deferred for any length of time. The grounds should be ordinarily communicated along with the order of detention and despite any special circumstances pointing to the contrary, they must be communicated within a reasonable time. If it is unnecessarily delayed and is ultimately found that his detention was completely unjustified, the delay amounts to playing with the liberty of a subject for no fault of his. Besides, the Provincial Government should not labour under a conception that such orders are completely immune from interference and free of the jurisdiction of the Court. As laid down in 23 Pat. 252,[1] under particular circumstances, it is quite open to the Court to take a view that the order was not bona fide order. The order has in its favour a very strong presumption of validity which carries along with it presumption that the Provincial Government was reasonably satisfied and that there were valid and

sufficient materials for being so satisfied but this presumption is a rebuttable one and after the order is made, the onus is on the subject, the detenu to satisfy that the order was not a bona fide one. By way of illustration, I may invite attention to the case of Jugeswar that was dealt with by his Lordship Shearer J. No doubt this presumption is very much weakened in circumstances where the Provincial Government unduly and without any rhyme or reason defers communicating to the detenu the grounds and other particulars which he is entitled to get notice within a reasonable time of his detention. Contumacious disregard of the provisions of S. 4 of the Ordinance cannot be deemed to have no adverse effect; it may, rather should, in the context of particular circumstances deprive the order of its due presumption of bona fide character and lay it open to the charge of it being a mere pretence for unlawful detention of a citizen. Under the circumstances this Court would strongly recommend to the Provincial Government to comply with the provisions of S. 4 and further to say that in case of continued disregard, orders of detention run the risk of being considered as sham orders and this Court will then have no other alternative but to direct restoration of the subject's liberty."

In Criminal Miscellaneous Case No. 125 which was also heard and decided by Reuben and Ray JJ., the material part of the judgment of Ray, J. was as follows :

"I have said in Criminal Miscellaneous Case No. 123 of 1947, disposed of on 2-5-1947, that non-compliance with the provisions of S. 4 of the Ordinance is a subsequent occurrence and it necessarily does not go to the root of the validity of the order. The order when passed was valid, and there is nothing to show in the Ordinance that the order becomes invalid or the detenu's detention under that order becomes illegal or improper on account of the unusual delay in compliance with or on account of non-compliance with the requirements of S. 4 of the Ordinance."

The contention before their Lordships seems to have been that non-compliance with the provisions of S. 4 invalidates the detention order ab initio. Their Lordships do not appear to have considered the possibility that a failure to supply the grounds as required by that section, while not affecting the initial validity of the order, may yet render further detention under the order illegal, and this is the point to which we propose to address ourselves.

[10] In dealing with the question of construction referred to us, it will be convenient first to consider the actual meaning and effect of the words used by the Legislature in S. 4 of the Act and to determine in relation thereto whether or not the provisions of that section have been complied with in this case; next, to review the scope and purpose of the Act in the light of the legislative power which the Provincial Legislature in passing the Act were purporting to exercise, and finally to consider and determine whether the provisions of the section are mandatory and, if so, the effect of non-compliance therewith or whether they are merely directory with no invalidating effect.

[11] For the immediate purpose the material words in S. 4 of the Act are :

"As soon as may be after the order is made, the authority making the order shall communicate to the person affected thereby the grounds . . . . to enable him to make . . . representation against the order . . . and it shall be the duty of the authority . . . to afford him the earliest practical opportunity of making such representation."

[12] What in this context is the effect of the words "as soon as may be"? We may ask ourselves—as soon as may be—what? In this respect, the Legislature, in providing that once the grounds have been served, the person affected shall be afforded the earliest practical opportunity of making a representation, has provided an express indication of its intention because it cannot have intended that there should be any greater degree of delay in communicating the grounds to the person affected than in affording him an opportunity of making his representation Any contrary inference would lead to an absurdity. On this basis, the grounds must be communicated as early as practicable, which is the same thing as saying as early as reasonable in the particular circumstances of the case. If authority be needed for this latter proposition we would refer, firstly, to the following note in Mr. P. Ramnatha Aiyar's Law Lexicon of British India under the head "practicable":

"Where something is required to be done at the earliest 'practicable' moment, the doing of the act is not required to be done at the very earliest moment; the adjective 'practicable' importing a difference according to circumstances and meaning, ordinarily, that the thing must be done as soon as reasonably can be expected."

Secondly, to the judgment of their Lordships of the Privy Council in 8 MOO. P. C. 203[2] in which it is stated, inter alia :

"The word 'forthwith' when used in an Act of Parliament, has been construed to mean 'in a reasonable time', as soon as the party who is to perform the act can reasonably perform it.";

and thirdly, to the decision of the Supreme Court of the United States of America in 207 Fed. 757[3] where it was held that when a notice is to be given 'immediately' under an employer's liability policy, it means reasonable notice. There are many similar decisions: (1825) 3 B. & C. 658[4]; (1841) 10 L. J. Com. Law 241,[5] (1842) 10 M. & W. 688[6] and (1846) 9 Q. B. 684[7]. We should arrive at exactly the same meaning by applying the ordinary rule of construction that where no time is mentioned for the doing of a thing a reasonable time is intended. We have no doubt, therefore, that the phrase "as soon as may be" as used in S. 4 of the Act means as early as is reasonable in the circumstances of the particular case. Beyond saying that it should ordinarily be possible to communicate the grounds to a detenu within a comparatively short period of time and

that after the lapse of such a period the onus will shift to the authority in question to show that the grounds were served as soon as was reasonable, we think it better not to indicate any particular period as being sufficient to shift the onus of proof. The circumstances will obviously differ to a substantial extent. What is reasonable in one set of circumstances may be quite unreasonable in another. In this case, the order under S. 2 (1) (a) of the Act was issued on 16th April 1947, the applicant was arrested thereunder on 9th May 1947, but the grounds of his detention were not communicated to him until 24th July 1947, and, in our opinion, it is abundantly clear that the authority concerned did not comply with the provisions of S. 4 of the Act. Indeed, the learned Government Advocate did not seriously argue the contrary.

[13] The Provincial Legislature are not a sovereign but a subordinate legislative authority and cannot go outside the powers of legislation conferred upon them by or in pursuance of the Government of India Act, 1935. The legislative power which the Provincial Legislature in passing the Act were purporting to exercise was, as we have already seen, the power to legislate for preventive detention in connection with the maintenance of public order which is conferred by S. 100 (2) and Item 1 of List 2 in Sch. 7, Government of India Act, 1935. In our opinion, the phrase "preventive detention" means detention, not, as in the case of ordinary imprisonment, in respect of the actual commission of an illegal act, but detention in reasonable anticipation that some illegal act or acts may otherwise be committed and in the context of Item 1 of List 2, in Sch. 7, Government of India Act, the illegal act must be one connected with the maintenance of public order. A further limitation upon the nature of the illegal act or acts in question is provided by S. 2 (1) of the Act which requires that they must be such as are not only prejudicial to the maintenance of public order but prejudicial also to the public safety.

[14] What distinguishes preventive from arbitrary detention, an entirely different subject-matter of legislation, is the existence of the reasonable anticipation that some illegal act or acts may otherwise be committed. It is obvious, therefore, that anything that weakens the fair and proper determination of the existence of such reasonable anticipation automatically tends to convert what would otherwise be preventive detention into a purely arbitrary detention, and at some point in that weakening process the question will arise whether an Act which purports to deal with preventive detention does in pith and in substance in fact so deal, or whether it has not overstepped the bounds and become ultra vires the Provincial Legislature in that it constitutes in effect an Act conferring upon the executive a power of arbitrary detention. No point on this aspect of the Act was taken before us, but this picture of the general background to the Act illustrates the importance that may properly be attributed to the provisions of S. 4 of the Act. Indeed, in the course of his order referring the point of law here in question for decision by a Full Bench, Bennett, J. stated, inter alia, his opinion that *ut res magis valeat quam pereat*, the provisions of S. 4 of the Act must be construed as mandatory because otherwise the Act would in effect be an Act conferring an arbitrary power of detention upon the executive and would for that reason be ultra vires the legislative powers of the Provincial Legislature. It is not necessary, however, for the purpose of this application, for us to express any final decision upon this point because for the reasons which follow we are of opinion that even if the Provincial Legislature had in this respect an unfettered power of legislation, the provisions of S. 4 of the Act would nevertheless fall to be construed as mandatory.

[15] We are of opinion that the mere fact that one of the formalities attendant upon the exercise of a statutory power is directed to be carried out after the exercise of such power has already commenced does not of itself preclude an intention on the part of the Legislature that non-compliance therewith shall have an invalidating effect upon the thing done or upon the continued doing of that thing.

[16] Whether a formality attending the performance of a statutory power is or is not essential to the validity of the thing done under such power depends upon the intention of the Legislature which is to be gathered from the actual words used in the stating of that formality when considered in the light of the scope and purpose of the enactment as a whole.

[17] No doubt where the formality prescribed as attendant upon the exercise of a statutory power is directed to be carried out before the commencement of such exercise, it will ordinarily be easier to infer the mandatory intention of the Legislature than where the prescribed formality is directed to be carried out subsequent to the commencement of such exercise. Indeed, the fact that the Legislature has authorised the exercise of the power at all before the prescribed formality is to be carried out will, where the circumstances are such that the Legislature could in practice have directed the formality to be carried before the commencement of the exercise of the power, itself give rise to an inference that the Legislature regarded its direction as to the carrying out of such formality as merely directory. But that

is not the case in regard to the formalities prescribed by S. 4 of the Act. The Act is an emergency one and action thereunder is obviously not to be delayed. When the authority concerned signs the order, it may well be that the grounds are not formulated in a manner which would permit of their immediate communication to the detenu. Moreover, the Legislature expressly contemplates that upon grounds of public policy it may not be possible to communicate to a detenu all or perhaps any of the grounds upon which the Provincial Government were satisfied as to the necessity for his detention. In the nature of things, therefore, it would not have been practical for the Legislature to have prescribed as a mandatory and invalidating provision that the formality of communication of the grounds of detention should be carried out either prior to or at the time of arrest and detention. There is, therefore, no inference here that because the Legislature have authorised the exercise of the power of detention to commence prior to the carrying out of the prescribed formality as to the communication of the grounds of detention that it did not intend that the failure to carry out that formality should have any invalidating effect. Nor, in our opinion, does any such inference arise in such circumstances from the mere fact that the Legislature has not declared what shall be the consequence of non-compliance with the prescribed formality. We are not aware of any general rule that in an enabling Act a direction that some formality attendant upon the exercise of the power thereby conferred shall be carried out at some time subsequent to the commencement of the exercise of such power must be considered as purely directory unless the Legislature has expressly stated some invalidating effect.

[18] In the realm of contract it is well settled that the breach of a condition subsequent may have as great an invalidating effect as the breach of a condition precedent although there may be no express statement to that effect. It is always a matter of interpretation as to the intention of the parties and there would not appear to be any reason why there should be any different rule of construction in relation to a statute. The learned Government Advocate relied upon the following statement made by Lord Blackburn in the course of his judgment in (1884) 9 A. C. 757,[8] at p. 778, as supporting the view that a provision in an Act of Parliament constituting a condition subsequent to the doing of the thing authorised by the Act is always directory :

"There are many cases. I was not aware that this point was to be raised, and I have not looked into them and I cannot refer to them, but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to grant or whatever it may be, but a condition subsequent; a condition as to which the responsible persons may be blameable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that."

[19] He would be a bold lawyer who differed from any statement of legal principle made by that very eminent Judge, but when Lord Blackburn's statement is looked at in relation to the context in which it was made, we do not think that it can fairly be said that he intended thereby to lay down any general rule that a provision in an Act of Parliament which constituted a condition subsequent to the doing of the thing authorised by the Act was always to be construed as being merely directory. Rather, we think that his Lordship had in mind the very inference, to which we have already drawn attention, which arises where the Legislature have expressed as a condition subsequent to the doing of the thing authorised by the Act a matter which it was open to the Legislature to have expressed as a condition precedent. The question for decision by the House of Lords in that case was the construction of S. 4, Superannuation Act, 1859 which provides that the Commissioners of the Treasury may in certain circumstances order the addition of a certain number of years for the purpose of computing the amount of the superannuation allowance to be paid to persons retired from the public service. At the end of that section there is the following proviso :

"Provided always, that every order or warrant made under this enactment shall be laid before Parliament."

It was argued that this proviso constituted a condition precedent to the order to be made under S. 4 and that non-compliance therewith invalidated the grant of the superannuation allowance in question. It was held that the proviso was directory only and it was in coming to this conclusion that Lord Blackburn expressed himself as above set out. It will be seen at once that the Proviso might have been read as constituting either a condition precedent or a condition subsequent to the order to be made under the section and that if it were construed as a condition subsequent, then, since it was clearly open to and practicable for Parliament to have stated it as a condition precedent, the inference was that it was intended to be directory only. Neither the Lord Chancellor, the Earl of Selborne, nor Lord Watson in the course of their judgments in that case mentioned the phrase 'condition subsequent'. The ratio decidendi of the judgment of the Lord Chancellor was as follows :

"With those preliminary considerations, we have to approach the words which relate to this special minute, 'If the compensation shall exceed' a certain amount (and for the present purpose I need not enter into the

detail of that) such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament.' It seems to me, that the object of that is to account for the excess, and to account for it by reasons to be communicated to Parliament, and that in the nature of the case it is not intended to affect the validity of the grant, at all events so far as relates to that which is not in excess, and which if granted alone would not require any special minute at all. But I do not shrink from going further than that, and saying that if that which is granted might properly be granted, and if the grant or the award is made, as far as the officer is concerned, in the usual manner, I do not think that the neglect of the Treasury or of their proper officer to record in their proper books a special minute, or their neglect to lay that special minute before Parliament, need be construed as nullifying what otherwise would be a valid grant and award of a pension made and announced to the pensioner in a form which is sufficient in all other cases. Therefore I think that your Lordships, without doing any real violence either to the spirit or to the language of the Act of Parliament, may dispose of that argument, in a manner which certainly will avoid consequences in the last degree inconvenient, and I may add unjust, which otherwise might possibly result."

and that of Lord Watson :

"The enactments with regard to a special minute appear to me to be plainly directory. I do not think it was intended that it should be a condition precedent of an arrangement made by the Treasury with respect to the retirement of a prison officer or any other civil servant whose case falls within the 7th section of the statute, that it should have the implied assent of Parliament, from the presentation of such a minute, and its lying unchallenged on the tables of either House for a certain period. That was not the intention of the provision. It was not intended to take away from the Commissioners of the Treasury the power of making these arrangements. The object of the provision is that, for the information of Parliament, a minute containing the special reasons for granting a large allowance to a civil servant in such circumstances shall be laid upon the table, it being of course within the power of one of the Houses of Parliament to deal as they choose in Committee of Supply with the allowances that are made by the Treasury."

The object of the section there under consideration was, therefore, considered by their Lordships to be a matter which had no possible relevance to the validity of the order made under S. 4, and it was upon that ground that their Lordships based their decision that the terms of the Proviso were directory only. In coming to this conclusion, their Lordships clearly thought it necessary to discuss and consider the words of the Proviso in relation to the whole scope and purpose of the Act. It would have been quite unnecessary for them to do so if in fact there existed any general rule of law that in a statute a condition subsequent to the doing of the thing authorised thereby is always to be construed as directory only. It may be instructive to note how different was the effect of the Proviso as construed by their Lordships from the provisions of S. 4 of the Act here in question. There the Proviso was not directed to any review of the order itself, here the express purpose of S. 4 of the Act is to secure such a review.

[20] There is no general rule as to when an enactment is absolute with the consequence that the neglect of the requirements of the Act as to the formalities attendant upon something to be done thereunder will invalidate the thing being done or is merely directory when the neglect of such requirements has no invalidating effect. As Lord Campbell stated in (1861) 30 L. J. Ch. 379[9]:

"No universal rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Court of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

The whole scope and purpose of the statute under consideration must be regarded: 1926 A. C. 619.[10]

[21] Counsel for the appellant called our attention and relied upon the following dictum of Brett L. J. (as he then was) in (1881) 6 Q. B. D. 376[11]:

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue."

The facts of that case are not without relevance to the question here under consideration because they show the importance attached by the Court of England to the smallest statutory safeguard contained in an enactment affecting the liberty of the subject. In that case a *writ de contumace capiendo*, a writ used for the purpose of enforcing obedience to the decree of an ecclesiastical Court, under the provisions of 53 Geo. III, C. 127, was issued from the Petty Bag Office, the Office belonging to the common law side of the Court of Chancery, out of which writs issued in matters wherein the Crown was mediately or immediately concerned ; so called because the writs were kept originally in a little sack or bag, and it was recorded in the Queen's Bench on the following day. The Court being not then sitting it was delivered to Sheriff. Under this writ the incumbent was arrested and lodged in prison. It was held by the Court of Appeal on appeal from the Queen's Bench Division that the *writ de conitumace capiendo* when brought into the Court of Queen's Bench, should there, in the presence of the justices, be opened and delivered of record to the Sheriff and that the failure to comply with that formality, which they held to be one of substance, invalidated the writ. Brett L. J. (as he then was) added :

"Although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at West-

minster will not allow any individual in this kingdom to procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects."

[22] It was suggested by the learned Government Advocate on behalf of the respondents that having regard to the decision in 23 Pat. 252[1] the ordinary powers of the High Court under S. 491, Criminal Procedure Code, constitute a sufficient protection to any person detained under an order issued under S. 2 (1) (a) of the Act and that it is therefore unnecessary to construe the provisions of S. 4 thereof as mandatory and absolute. In our opinion, this argument is incorrect and fallacious. Whilst it may be open to the Court to infer mala fides from unreasonable delay, the Court cannot be astute to label mere negligence with the badge of fraud and, in relation to an Act the effect of an order under which is limited to six months, it is obvious that the point at which delay can properly give rise to an inference of fraud will itself be so delayed as to exclude the possibility of any effective protection to a detenu from such inference. For instance, in this very case, the grounds for his detention were not served upon the detenu until well over three months after the date of the order under S. 2 (1) (a) of the Act, but, in our opinion, Bennett and Ramaswami JJ. rightly rejected any inference that the Provincial Government were acting mala fide.

[22a] It was next urged on behalf of the respondent that S. 4 of the Act could not have been regarded by the Legislature as affording any substantial protection to the detenu because it leaves it open to the authority concerned to take no action upon the representations made to it, or alternatively to plead that it would be against the public interest to furnish the grounds of detention. We cannot accept this contention. We do not think that it can be suggested that the Legislature would not properly contemplate that due and proper consideration would be given to the representations made by the detenu and that the authority concerned would examine bona fide and fairly the privilege granted on the grounds of public interest. The benefit and safeguard to the detenu of the communication to him of the grounds for his detention cannot, except possibly in relation to the provisions of S. 2 (5) of the Act, be restricted to the mere possibility of representations by him to the authority concerned. Once the grounds are communicated, the authority is committed thereto, and if they be incorrect or insufficient the detenu will ordinarily be in a position to secure action on his behalf by his friends and relations and by his member in the Legislative Assembly. Section 4 of the Act merely applies to the grounds of detention the ordinary rule as to the privilege from production of a State document on the ground of public interest, and the Court, if it thinks fit, can compel the objection to be taken personally before it and on oath by the authority concerned. This can hardly, therefore, be termed an empty provision.

[23] It was also suggested that if the provisions of S. 4 of the Act are mandatory, a subordinate official by his negligence or deliberately might defeat the object of the Act. It may well be that in relation to one or more individual detenues that is so, but such a contingency is inherent in every mandatory formality attached to the doing of a thing under an enabling Act and is certainly no reason for holding that the performance of the formality is merely permissive.

[24] We therefore agree with the opinion expressed by Bennett, J., in the course of the order under reference as to the proper construction to be placed upon S. 4 of the Act, namely:

"Freedom from arbitrary arrest and detention and protection therefrom under the rule of law is the very foundation-stone of the individual liberty and the rights of the subject. When to meet an emergency affecting the maintenance of public order powers are granted by the Legislature to the executive which constitute an inroad upon such freedom and protection, it would, in my opinion, require a clear provision to that effect or some provision providing some adequate and alternative protection, before it could be assumed that the Legislature intended to go beyond what was reasonably necessary for the maintenance of public order by providing that the safeguards which it had enacted against an abusive exercise of such powers should be interpreted as being merely directory. There is no such clear provision in the Bihar Maintenance of Public Order Act, 1947, and there is no protection at all against the abuse of the powers granted by S. 2 (1) (a) of the Act other than the provisions of S. 4 thereof. I find myself quite unable to come to the conclusion that for the maintenance of public order the Legislature intended to create a position where every subject at the sole discretion of the Provincial Executive should be liable to preventive detention for six months, without being informed as soon as reasonably possible of the grounds for his detention and that when it enacted in positive and mandatory terms that 'the authority making the order shall communicate the grounds' it was merely expressing a pious hope which the Executive might disregard without affecting the validity of the continued detention of the detenu."

[25] There remains the question as to the effect of non-compliance with the mandatory provisions of S. 4 of the Act. In this respect we do not think that we should look too narrowly at the order made under S. 2 (1) (a) and consider its initial or continued validity. The Act is not primarily concerned with orders but with the preventive detenion of persons whose detention the Provincial Government is satisfied

is necessary with a view to prevent them from acting in any manner prejudicial to the public safety and maintenance of public order. The order made under S. 2 (1) (a) is mere machinery through which the object of the Act, namely, the detention of the person concerned is carried out and, in our opinion, it is that detention which becomes illegal if the grounds for his detention are not communicated to the detenu within a reasonable time. It is unnecessary to infer any intention on the part of the Legislature that the order issued under S. 2 (1) (a) should be avoided ab initio. In our opinion, therefore, the applicant was being illegally detained and, as we were of that opinion but desired, in view of the importance of the matter, to consider our judgment we have already ordered his immediate release.

[26] We desire to call the attention of the authorities concerned to the fact that S. 4 of the Act directs that the detenu shall be furnished with such particulars of the grounds of detention as will enable him if he wishes to make a representation against the order under S. 2 (1) (a). The first grounds which were communicated to the applicant on 10-6-1947, clearly contain no such particulars. Those grounds were cancelled by the fuller grounds dated 17-7-1947, which were communicated to him on 24-7-1947, but even those grounds are stated in very general terms and it would seem that it should have been possible to give more precise and detailed particulars of the acts of which he was suspected.

[27] We would also draw the attention of the authorities concerned to the fact that a large number of similar cases have come before the High Court and that it has become abundantly apparent that the importance of a prompt communication of the grounds of detention to every person detained under an order passed under S. 2 (1) (a) of the Act has not been appreciated. We have at present no reason to doubt that the omissions were due to inadvertence, but it is in the highest degree important that all servants of the Executive should realise that every formality relating or attached to the deprivation of the liberty of any individual must be scrupulously carried out.

[28] Finally, we would order that a copy of this judgment be sent to the Provincial Government immediately.

S.C. *Petition allowed.*

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## A. I. R. (35) 1948 Patna 143 *[C. N. 52.]*

MEREDITH AND SINHA JJ.

*Lachmi Narayan Lal and others — Defendants-Appellants* v. *Bhupendra Prasad Shukul and others —Co-Plaintiffs—Respondents.*

A. F. O. D. No. 58 of 1942 and A. F. O. O. Nos. 261 and 390 of 1944, Decided on 27-11-1946.

(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 163 (5) — Applicability — S. 163 (5) applies to sale of holding only and not to sale of tenure: 1943 P. W. N. 182, *Rel. on.* [Para 4]

(b) Bihar Tenancy Act (8 [VIII] of 1885) S. 163 (2) (b) — Failure to observe provisions of S. 163 (2) (b) — Sale is not complete nullity: 28 A. I. R. 1941 Pat. 440 and 29 A. I. R. 1942 Pat. 238, *Rel. on.* [Para 4]

(c) Bihar Tenancy Act (8 [VIII] of 1885), S. 163 — Rent execution — Simultaneous issue of sale proclamation and attachment—Execution, if necessarily rent execution — Civil P. C. (1908), O. 21, R. 67 (as amended in Patna).

The mere fact that sale proclamation and attachment were issued together in execution of a decree would not in itself make the execution a rent-execution because even under O. 21, R. 67, Civil P. C., as amended by the Patna High Court, it is possible to issue attachment and sale proclamation simultaneously in money executions. [Para 6]

(d) Bihar Tenancy Act (8 [VIII] of 1885), S. 158B (2) — Rent decree — Execution sale — No notice under S. 158B (2)—But notice under O. 21, R. 22, Civil P. C. served— Sale, if valid.

No doubt a sale held in execution of a rent decree without issuing the notice under S. 158B (2) is without jurisdiction: 34 A. I. R. 1947 Pat. 33, *Rel. on.* [Para 5]

But where notice under O. 21, R. 22, Civil P. C., was issued and served the sale cannot be a nullity or without jurisdiction. It would at least take effect as a money sale i. e., a sale of the right, title and interest of the judgment-debtor because under S. 158AA of the Act it is open to the decree-holder to elect whether he will proceed by way of rent execution against the tenure or holding itself or merely against the property of the judgment-debtor. In such a case, if the sale could be set aside at all it would be within one month under O. 21, R. 90. [Para 7]

(e) Bihar Tenancy Act (8 [VIII] of 1885), Ss. 158B and 65 — Rent decree — Sale in execution taking effect only as money sale—Arrears of rent between date of suit and sale — Liability for.

Where the landlord purchases a tenure at a sale in execution of his rent decree which takes effect only as a money sale i. e., a sale of the right, title and interest of the judgment-debtor, the landlord takes the property subject to the liability for arrears of rent accruing due between the date of the suit and date of the sale though such liability may not have been notified in the sale proclamation: 32 A. I. R. 1945 Pat. 33 (F. B.) and 25 A. I. R. 1938 Cal. 681, *Rel. on*; 8 A. I. R. 1921 Pat. 184, *Expl.* [Paras 11, 12]

*Cases referred:*—

1. ('43) 22 Pat. 628 : 31 A. I. R. 1944 Pat. 101 : 211 I. C. 614.
2. ('41) 28 A. I. R. 1941 Pat. 440 : 193 I. C. 124.
3. ('41) 21 Pat. 281 : 29 A. I. R. 1942 Pat. 238 : 200 I. C. 782.
4. ('46) 25 Pat. 267 : 34 A. I. R. 1947 Pat. 33 : 229 I. C. 52.
5. ('45) 24 Pat. 9 : 32 A. I. R. 1945 Pat. 33 : 221 I. C. 529 (F. B.).
6. ('38) 42 C. W. N. 967 : 25 A. I. R. 1938 Cal. 681 : 179 I. C. 501.
7. ('21) 6 Pat. L. J. 354 : 8 A. I. R. 1921 Pat. 184 : 62 I. C. 532.

*In No. 58 of 1942.*

*S. N. Bose, A. N. Lal and K. N. Varma* — for Appellants.

*Prem Lall and S. C. Mukherji*—for Respondents.

*In No. 261 of 1944.*
*Prem Lall and S. C. Mukherji* — for Appellants.
*Mahabir Prasad, K. N. Varma and A. N. Lal* — for Respondents.
*In No. 390 of 1944.*
*Mahabir Prasad and A. N. Lal*—for Appellants.
*Prem Lall and S. C. Mukherji*—for Respondents.

**Meredith J.**—All these three appeals are connected, and so have been heard together. They relate to various matters in regard to the same tenure. This tenure was created by a lease of 13-11-1906. In November 1938, a rent suit was brought for rent up to the Asin kist of the year 1345, and on 2-7-1940, this suit was decreed for a sum of Rs. 16,000 and odd. Execution was taken out in Execution Case No. 3 of 1941 in the Court of the Subordinate Judge, Gaya. On 28-4-1941 sale proclamation was issued, and on 5-7-1941, the property was sold, and the landlords, decree-holders purchased the tenure for Rs. 18,000 and odd. On 4-9-1941, delivery of possession was taken.

[2] On 21-12-1943, more than two years later an alleged mortgagee of the tenants judgment-debtors made an application under S. 47, Civil P. C., to have the sale declared void and without jurisdiction. The learned Subordinate Judge said that the contention was that the sale was void for non-compliance with the provisions of Ss. 158 and 163A, Bihar Tenancy Act. He obviously meant Ss. 158B and 163. The opposite party did not appear, and the learned Subordinate Judge allowed the application and held that the sale was void and without jurisdiction.

[3] This order is the subject-matter of Miscellaneous Appeal No. 261, which is, of course, by the decree-holders and which I shall deal with first. It is quite clear that as an application under O. 21, R. 90 the application could not succeed as it was long out of time. It would be in time, however, if the sale was without jurisdiction and the application could be treated as one under S. 47. Taking first S. 163, S. 163 (2) (b) provides that the sale proclamation, *inter-alia*, shall state the value of the tenure or the holding or, if the property to be sold is a portion of a holding, the value of such portion as determined by the Court in the manner specified. Section 163 (5) provides that before issuing the sale proclamation, the Court executing the decree shall hear the parties and estimate the value of the holding or of that portion of the holding the proceeds of the sale of which it considers will be sufficient to satisfy the decree.

[4] It is significant that whereas in S. 163 (1) reference is made to a tenure or a holding, and so also in S. 163 (2) (b), in S. 163 (5) the reference is to a holding only. It seems, therefore, that S. 163 (5) has no reference to the case of a tenure with which we are concerned at present. The same has been so held by a Bench of this Court is *Sonu Lal* v. *Bartram Keightley* 22 Pat. 628.[1] The Bench held that sub-s. (5) of the section only comes into operation when the property to be sold is a holding, and by valuing it or a part thereof the entire decree will be satisfied by the proceeds of the sale thereof. It is clear that sub-s. (5) is not applicable. The position, therefore, merely is that under S. 163 (2) (b) it was incumbent to state the value of the tenure in the sale proclamation. Formally this was done, but it was merely the decree-holder's valuation which was accepted by the Court without hearing the judgment-debtor. In the ruling I have just cited, it has been laid down that a Court is bound under S. 163 (2) (b), Bihar Tenancy Act, to value the whole of a tenure before ordering its sale in execution of a decree. Let us assume, without deciding, that what was done did not amount to valuation within the meaning of S. 163 (2) (b). The question is what is the legal effect? Will it render the sale without jurisdiction? In my opinion, it will not. The position will be similar to cases of omitting to value the property after hearing the parties under S. 13, Money-Lenders Act. In the latter case, we have two rulings of this Court laying down that the sale will not be without jurisdiction, first, *Chandra Sekhar* v. *Bhagwan Das* (A.I.R. 1941 Pat. 440[2]) and second, *Sheo Dayal Narain* v. *Mt. Moti Kuer* (21 Pat. 281.[3]) The failure to observe the provisions of S. 163 (2) (b), if there has been such a failure, does not render the sale a complete nullity.

[5] I now come to S. 158B. The first part of S. 158B prescribes the conditions under which the tenure or holding shall pass to the purchaser. In other words, the sale will be a rent sale. The second part lays down the procedure that must be followed by the decree-holder if he wants the sale to be a rent sale. It is in these terms :

"When the application mentioned in S. 158AA is made and the decree-holder wants to proceed against the tenure or holding or portion of the tenure or holding in respect of which the decree was obtained, the Court executing the decree shall, before proceeding to sell the tenure or the holding or a part of the holding, give to the parties to the decree notice of the application and of the date on which the sale proclamation shall be drawn up, and may, notwithstanding anything contained in the Code of Civil Procedure, 1908, simultaneously issue attachment."

It has been held by a Bench of this Court in *Kameshwar Singh* v. *Bishwanath Jha* (25 Pat. 267[4]) that S. 158B (2) is a corresponding provision to O. 21, R. 22, Civil P. C., and the reason why under S. 148 (1), Bihar Tenancy Act the notice under O. 21, R. 22, has been dispensed with in rent executions is because a corresponding mandatory notice has been prescribed under S. 158B (2), and failure to comply with the section would have the same consequence as failure to comply with the provision of O. 21,

R. 22 in cases where that provision is applicable. That is to say, as held by this Court, the sale would be a nullity.

[6] In the present case, no notice was issued under S. 158B (2), and, therefore *prima facie* it would appear under this ruling that the sale was without jurisdiction. But the circumstances in which this notice was not issued are peculiar. It appears that the decree-holders of their own choice chose to adopt the procedure for the execution of money decrees and so applied for issue of notice under O. 21, R. 22, and such notice was issued and served as appears from the order-sheet. Then there was an order for attachment, and only after that the Court observed that the order had been passed by mistake as the decree was a rent decree; so the order would be recalled and the sale proclamation and attachment would be issued together, and this was done. It is to be noticed that the mere fact that sale proclamation and attachment were issued together would not in itself make it a rent execution, because even under O. 21, R. 67, Civil P. C., as amended by this Court, it is possible to issue attachment and sale proclamation simultaneously in money execution.

[7] The question is, in these circumstances, what is the effect of the omission to issue the notice under S. 158B (2)? It is, in my opinion, quite clear that having regard to the fact that notice was issued and served under O. 21, R. 22, the sale could not be a nullity, or without jurisdiction. It would at least take effect as a money sale, that is to say, a sale of the right, title and interest of the judgment-debtor, because under S. 158AA, Bihar Tenancy Act, it is quite open to the decree-holder to elect whether he will proceed by way of rent execution against the tenure or holding itself or merely against the property of the judgment-debtor, and there would be nothing illegal in proceeding under the Code of Civil Procedure and issuing the notice under O. 21, R. 22, the Court in each case being the same. The Court will thereby acquire full jurisdiction to sell the property of the judgment-debtor. This being so, it cannot be said in the present case that the failure to issue the notice under S. 158B (2) rendered the sale wholly without jurisdiction. In that view if the sale could be set aside at all it would be only within one month under O. 21, R. 90, and the application to set aside sale, apart from the fact that it was without merit, was long barred by time. The result is that Miscellaneous Appeal No. 261 succeeds, and I would allow it with costs and set aside the order holding the sale a nullity.

[8] I now come to Miscellaneous Appeal No. 390. On 9-6-1944, the judgment-debtors made a similar application under S. 47. The learned Subordinate Judge rejected their application, because he said the sale had already been set aside on the application of the mortgagee, and there was nothing further to set aside. Against this order the judgment-debtors have come in appeal. In view of what I have already said it is clear that in any view that application was rightly rejected. It also was long out of time. This appeal, therefore, fails and must be dismissed with costs.

[9] Lastly, there is the First Appeal No. 58. At the time when the sale took place a second suit was pending against the tenants for rent which was said to have accrued due before the sale, namely, the period from the January kisht of 1938 to the January kisht of 1941. The previous suit had been brought under the Transfer of Property Act. It was alleged that a notice to quit had been served. Rent was claimed up to the time of the quit notice, and for the subsequent period damages for use and occupation were claimed. The Court held that the suit was one under the Bihar Tenancy Act. The notice to quit was ineffective. Therefore, damages could not be allowed, and as rent had not been claimed in the alternative that suit was dismissed with regard to the period in question which was the four kishts of the year 1938.

[10] The defence in the suit then was, first that at the sale referred to the tenure had been purchased subject to the liability for rent due at the time, and, therefore, no suit could subsequently be brought against the tenants for the rent of that period. Secondly, the claim was, in any event, barred for the four kists of 1938 because under the provisions of O. 2, R. 2, Civil P. C., rent for that period should have been claimed in the previous suit.

[11] Both contentions were rejected by the learned Subordinate Judge, but, in my opinion, he should certainly have accepted the first contention and dismissed the suit on that ground. I have already stated the circumstances in which the sale took place and given my reasons for holding that the sale would take effect as a sale only of the right, title and interest of the judgment-debtors. The property would, therefore, be sold subject to existing encumbrances including the liability for rent. In the sale proclamation reference was made to that liability, but it was in somewhat ambiguous terms. It was stated :

"Be it known that the mokarari rent of the said tenure for January kisht of 1345 Fasli up to January kisht of 1348 Fasli is due by the judgment-debtors for the recovery of which a suit being Rent Suit No. 1 of 1941 has already been instituted in the first Court of the Subordinate Judge at Gaya against the judgment-debtors and is pending trial."

In the sale certificate it was also notified that the rent for this period was due by the judgment-

debtors, and in the bid sheet it is mentioned that the encumbrance was read out. Obviously all this is ambiguous. On one reading it might be a notification that the sale was subject to the liability, on another reading it might be taken as an indication that it was intended by the landlord to saddle the judgment-debtors with the liability. However that may be, once it is held that the sale was a money sale the landlord's wishes would become irrelevant, since all he could sell would be the right, title and interest of the judgment-debtors. The position has been clearly laid down by a Full Bench of this Court in *Kalyani Prasad* v. *Surendra Nath* (24 Pat. 9[5]) wherein it is held that a landlord, who purchases a tenure in execution of a money decree obtained by him in a suit for recovery of arrears of rent of a tenure takes the property subject to the liability for the arrears of rent accruing due between the date of the suit and the date of the sale, though such liability may not have been notified in the sale proclamation. That is exactly the position in the present case, and we are bound by the ruling of the Full Bench. It is true that that was a case under the Chota Nagpur Tenancy Act, but there is no significant difference between the two Acts in this regard. The proviso to S. 60, Chota Nagpur Tenancy Act, which does not occur in the Bihar Tenancy Act, is irrelevant, because as pointed out by the Full Bench, that proviso obviously refers to a rent decree and rent sale, and in the present case we are dealing with a money sale. In the course of the judgment the learned Judges referred to an observation of Ghose J. with regard to the Bengal Tenancy Act upon this point in *Midnapur Zamindary Co. Ltd.* v. *Mrinal Kanti Roy* (42 C. W. N. 967[6]). Ghose J. said :

"The tenant was liable for those arrears. The landlord has now placed himself in the position of that tenant by purchasing his right, title and interest. Then can the Landlord still say that he can claim these arrears from the person whose right, title and interest he has purchased ? . . . . . Moreover so far as the landlord auction-purchaser is concerned, he does not require any notice that arrears of rent are due."

That I apprehend, correctly states the position. Moreover, the Full Bench has expressed the opinion that the position with regard to sales in money executions would be the same under the Bihar Tenancy Act. Mr. Prem Lall for the respondents relies upon *Kesho Prasad Singh* v. *Paranjota Koer* (6 P. L. J. 354[7]) but all that was laid down in that case was that if the landlord obtains two rent decrees against a tenant and first executes one decree by sale of the holding without notifying that the sale is subject to the other decree, and purchases the holding himself, he is not debarred from executing the other decree against the remaining properties of the tenant. That seems to me, with respect, obviously correct, because in a rent sale, without any notification that the sale was subject to any encumbrance, the holding will pass free from encumbrance, and, therefore, the tenant and not the landlord, would be liable for any rent due at the time of the sale. But this ruling quite clearly, is inapplicable to a case like the present one where the sale is not a rent sale.

[12] In my opinion, after the sale no suit for rent of the previous period could lie against the former tenants, and the suit should have been dismissed. As the appeal succeeds on this ground, it is unnecessary to express any opinion with regard to the point taken under O. 2, R. 2. I would, therefore, allow First Appeal No. 58 with costs, and direct that the suit be dismissed with costs.

**Sinha J.**—I agree.

G.N. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 146** *[C. N. 53.]*

DAS AND AYYAR JJ.

*Manabodh Panda and another*—*Appellants*: v. *Sm. Rajkumari Misrani* — *Respondent.*

**A. F. O. O. Nos. 13 and 30 of 1944, Decided on 19-9-1947, from original orders of Sub-Judge, Sambalpur, D/- 24-1-1944.**

**Orissa Money-lenders Act (3 [III] of 1939), Ss. 11 (1) (i) and (iv) and 10 — Sale in execution of final mortgage decree held before Act — Personal decree unsatisfied on that date — Relief under Act —Sale, if can be set aside.**

**Where in a suit for the recovery of money lent upon a mortgage, the final decree was executed by the sale of the mortgaged property before the coming into force of the Orissa Money-lenders Act, but the personal decree for the unrealized balance remained unsatisfied on the date when the Act came into force, the Court cannot either under Cl. (i) or Cl. (iv) of S. 11 (1) on an application for relief under this Act, set aside the sale validly held or disturb the title acquired by such sale. The sale and the title acquired thereunder have taken matter beyond the region of contract and it is no longer a case of reopening a transaction or taking an account between the parties.**

**In considering the matter it would not be right to adopt the reasoning of some of the Calcutta decisions given with reference to provisions of S. 36, Bengal Money-lenders Act, for the simple reason that the provisions of the Bengal Act are different from those of the Orissa Money-lenders Act : 31 A. I. R. 1944 Cal. 193 (F. B.); 31 A.I.R. 1944 P. C. 35; 29 A. I. R. 1942 Cal. 123, *Disting.*; 49 Cal. W. N. 367 and 32 A. I. R. 1945 Cal. 177, *Ref.* [Paras 4, 5]**

*Cases referred* : —

**1. ('44) 31 A.I.R. 1944 Cal. 193 : I. L. R. (1944) 2 Cal. 376 : 213 I. C. 273 (F. B.), Mritunjoy Mitra v. Satish Chandra.**

**2. ('44) 31 A.I.R. 1944 P. C. 35 : 19 Luck. 309 : I.L.R. (1944) Kar. P. C. 199 : 71 I. A. 56 : 213 I. C. 342 (P. C.), Raghuraj Singh v. Hari Kishan Das.**

**3. ('42) 29 A.I.R. 1942 Cal. 123 : I. L. R. (1942) 1 Cal. 61 : 204 I. C. 493, Mritunjoy Roy v. Netai Chand.**

4. ('45) 49 C. W. N. 367, Sambhu Charan Dey v. Hrishikesh Dey.
5. ('45) 32 A.I.R. 1945 Cal. 177 : 220 I. C. 85, Jadu Nath v. Kshitish Chandra.

*L. Panigrahi* — for Appellants.
*M. S. Rao and P. C. Chatterji* — for Respondent.

**Das J.** — These two appeals arise out of an execution matter, and have been heard together. Miscellaneous Appeal NO. 13 of 1944 is an appeal by the judgment-debtor from an order of the learned Subordinate Judge of Sambalpur dated 24-1-1944 by which the learned Subordinate Judge has refused an application of the judgment-debtor, filed for certain reliefs under the Orissa Money-lenders Act, to set aside in effect a sale held on 15-8-1939. The other appeal, namely, Miscellaneous Appeal NO. 30 of 1944 is an appeal by the decree-holder against the said order of the learned Subordinate Judge granting certain other reliefs to the judgment-debtor. As the two appeals have been heard together, this judgment will govern both of them.

[2] The facts out of which these two appeals have arisen are shortly stated below. The judgment-debtor Manabodh Panda had executed a mortgage in respect of certain properties in favour of the decree-holder, Srimati Rajkumari Misrani, on 24-3-1927. Rajkumari Misrani brought a suit on the foot of the mortgage in 1935 and obtained a preliminary decree on 30-4-1937. This decree was made final on 4-11-1938. The final decree was for a sum of Rs. 18,000 odd, out of which a sum of Rs. 7,000 represented the principal amount of the mortgage bond, and Rs. 11,000 odd respresented interest. The final decree was put in execution, and on 7-8-1939, the judgment-debtor applied for certain reliefs under the Orissa Money-lenders Act (Act 3 [III] of 1939). This Act, so far as the relevant sections are concerned, came into force on 1-7-1939 throughout the province of Orissa; it could not, however, come into force in Sambalpur, which was a partially excluded area, in the absence of a notification under S. 92, Government of India Act, 1935. Such a notification was issued on 12-4-1940 by which the relevant sections of the Orissa Money-lenders Act, 1939, came into force in Sambalpur with effect from 15-4-1940 subject to certain modifications. Therefore, the date on which the judgment-debtor filed his application for relief under the Orissa Money-lenders Act was a date on which the Orissa Money-lenders Act, 1939, had not come into force in Sambalpur. On 15-8-1939 the learned Subordinate Judge dismissed the application on the short ground that the Orissa Money-lenders Act, 1939, had not been extended to Sambalpur. A sale was held on that date and the mortgage properties (some 800 acres of land) were sold for a sum of Rs. 10,000. The sale did not fully satisfy the decree and on 4-7-1942, a personal decree under O. 34, R. 6 was obtained for a sum of Rs. 10,000 odd. In the meantime, the judgment-debtor had appealed against the order of the learned Subordinate Judge rejecting his application for relief under the Orissa Money-lenders Act, 1939, on 15-8-1939. This appeal was Miscellaneous Appeal NO. 36 of 1939 of this Court and was disposed of on 18-9-1942. It was pointed out by this Court that the order of the learned Subordinate Judge dated 15-8-1939, was correct inasmuch as the Orissa Money-lenders Act, 1939, did not apply in Sambalpur till after the notification under S. 92, Government of India Act, 1935. Dealing with the question whether in view of the personal decree passed in 1942 the judgment-debtor was entitled to reliefs under the Orissa Money-lenders Act, 1939, this Court observed as follows in Miscellaneous Appeal NO. 36 of 1939 :

> "It may be that the appellant can make out a case for relief under S. 11, sub-s. (2), Money-lenders Act, since that decree (the personal decree for Rs. 10,886) has not yet been executed and the Money-lenders Act now extends to Sambalpur. But, if so, the proper place for that prayer to be made is not here, but before the Court of first instance which can, if necessary, take evidence and enter into the merits. It appears to be open to the appellant to make an application now before the learned Subordinate Judge and I have no doubt that any such application, if made, will receive full consideration both from the legal point of view and upon the merits from the learned Subordinate Judge."

With these observations the appeal NO. 36 of 1939 was dismissed by this Court. On 3-5-1943 the judgment-debtor filed his present petition for certain reliefs under the Orissa Money-lenders Act, 1939. This petition has been dealt with by the learned Subordinate Judge as per his order dated 24-1-1944, the order in question in the two appeals before us. The learned Subordinate Judge has held that under the provisions of the Orissa Money-lenders Act, 1939, it was not open to him to interfere with or set aside the sale held on 15-8-1939, inasmuch as the sale had been validly held before the Orissa Money-lenders Act came into force in Sambalpur. The learned Subordinate Judge has further pointed out that the decree-holder had taken delivery of possession through Court in February 1940, which was also before the Orissa Money-lenders Act, 1939, came into force in Sambalpur. The learned Subordinate Judge has expressed the view that title validly acquired by a sale held before the coming into force of the Orissa Money-lenders Act, 1939, could not be disturbed, because none of the provisions of the Orissa Money-lenders Act warranted such disturbance. In that view of the matter, he refused to set aside the sale but granted certain reliefs to the judgment-debtor in respect of the unsatisfied personal decree passed on 4-7-1942. The reliefs which the learned Sub-

ordinate Judge has given to the judgment-debtor may be expressed in his own words :

"Interest was allowed at 12 per cent. per annum and it has to be reduced to 9 per cent. per annum and that the interest must not exceed the principal. The learned pleader of the applicants admitted that the interest now would be more than Rs. 7000 which was the principal. The opposite party is therefore entitled to recover Rs. 14,000 as principal and interest with costs of the original suit and of final decree and personal decree with future interest at 5 per cent. per annum as directed in the preliminary decree, on the costs, less the amount of Rs. 10,000 realised by the sale of the property."

The learned Subordinate Judge has also allowed the judgment-debtor to pay the balance due in four equal six monthly instalments. The main grievance of the judgment-debtor is that the learned Subordinate Judge has not set aside the sale and prepared a new decree for the realisation of the dues under the mortgage bond of 1927 in accordance with the provisions of the Orissa Money-lenders Act, 1939. The decree-holder's grievance against the order of the learned Subordinate Judge, as stated in the memorandum of appeal, is that the learned Subordinate Judge has wrongly held that the decree-holder was a money-lender within the meaning of the Orissa Money-lenders Act, 1939, and further that the learned Subordinate Judge should not have refused interest pendente lite. Out of these two points mentioned in the memorandum of appeal presented by the decree-holder, only the latter point regarding pendente lite interest has been pressed before us.

[3] It would appear from what I have stated above that the main point for decision in connection with the appeal of the judgment-debtor is if the learned Subordinate Judge should have reopened the transaction between the parties, under the Orissa Money-lenders Act, 1939, in such a way as to set aside the sale held on 15-8-1939 and make a new decree for the parties, and a fresh valuation of the properties to be sold for the dues under the new decree. The learned Advocate-General, appearing for the judgment-debtor appellant, has placed several sections of the Money-lenders Act before us. He has drawn our attention to certain amendments made in the Orissa Money-lenders Act by Act 18 [XVIII] of 1947, which was extended to Sambalpur by a notification on 1-8-1947. The learned Advocate-General relies mainly on Ss. 10 and 11 of the Act as amended up-to-date. Sub-section (2) of S. 11 is in the following terms :

"Where a decree passed by a Court on 1-4-1936 or thereafter, on the basis of a loan, remains unsatisfied in whole or in part on the date on which this Act comes into force, the Court which passed the decree, or the Court or other authority to which the decree is sent for execution shall, on the application of the judgment-debtor, exercise all or any of the powers specified in sub-section (1)."

Sub-section (1) of S. 11 as amended up-to-date says that in any suit whether brought by a money lender or by any other person in respect of a loan advanced before the commencement of this Act, the Court shall exercise all or any of the following powers as may be applicable to it: then the powers are mentioned of which cls. (i) and (iv) are relevant for our purpose. Clause (i) is as follows :

"Re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest, in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan" ;

clause (iv) is in the following terms :

"Set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the money-lender has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just."

By the Amending Act of 1947 a new sub-section, namely, sub-s. (3) has been added to S. 10. This new sub-section is in the following terms :

"Where a decree passed by a Court on 1st April 1936, or thereafter on the basis of a loan remains unsatisfied in whole or in part on the date on which the Orissa Money-lenders (Amendment) Act, 1947, comes into force, the Court which passed the decree or the Court or other authority to which the decree is sent for execution shall, on the application of the judgment-debtor, exercise the powers specified in sub-s. (2) and the decree shall be modified accordingly."

Sub-section (2) of S. 10 says that in such suit, as is referred to in sub-s. (1), the Court shall appropriate towards the satisfaction of the loan any sum realised as interest through Court or otherwise, for the period preceding the institution of the suit, which is greater than the amount of the loan originally advanced. I may also refer here to sub-s. (1) of S. 10, which has been amended by Act 18 [XVIII] of 1947. That sub-section in effect says that no Court shall in respect of a loan advanced before or after the commencement of this Act pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced. Both Ss. 10 and 11 as they originally stood referred to a suit brought by a money-lender. By the amendment made in 1947 they now apply to a suit whether brought by a money-lender or by any other person in respect of a loan. The learned Advocate-General has contended before us that by virtue of the provisions of S. 16 amended Ss. 10 and 11 will now apply, so far as may be, to appeals and proceedings in execution arising in respect of decrees passed on 1st April 1936 or thereafter on the basis of loans, whether such appeals or proceedings were pending on or instituted after the date on which the said sections came into force. The main conten-

tion of the learned Advocate-General is that the personal decree passed in July 1942 still remains unsatisfied. The personal decree is for the balance of the amount which the judgment-debtor was found liable to pay to the decree-holder under the preliminary decree passed on 30th April 1937 and the final decree passed on 4th November 1938. It is contended that all the decrees in this case were passed after 1st April 1936 and they still remain unsatisfied. The suit is, therefore, still pending and by virtue of the provisions of sub-s. (2) of S. 11, sub-s. (3) of S. 10 and S. 16, Orissa Money-lenders Act, the judgment-debtor is entitled to all the reliefs under the various sections of the Orissa Money-lenders Act, and if in order to give such reliefs it becomes necessary to set aside the sale held on 15th August 1939 or to disturb a title acquired by that sale, the Court is entitled to do so by virtue of the aforesaid provisions of the Orissa Money-lenders Act. This is the sum and substance of the contention, as I have understood it, of the learned Advocate-General. On behalf of the decree-holder, however, it has been contended that none of the provisions of the Orissa Money-lenders Act authorise the setting aside of a sale held before the Orissa Money-lenders Act came into force or the disturbance of a title acquired at such a sale. On behalf of the decree-holder it is contended that it may be open to the Court to apply the Orissa Money-lenders Act to the unsatisfied personal decree and give whatever relief the judgment-debtor is entitled to under the Orissa Money-lenders Act; but the Court is not entitled under the provisions of the Orissa Money-lenders Act to set aside a sale which had been validly held before the Orissa Money-lenders Act came into force or to disturb a title acquired by that sale.

[4] Stated in the form mentioned above, the question at issue reduces itself to the simple question if any of the provisions of the Orissa Money-lenders Act, 1939, authorise the Court, either by express words or by necessary implication to set aside a sale validly held before the coming into force of the Orissa Money-lenders Act, 1939, or to disturb a title acquired at such a sale. The learned Advocate-General has not been able to show us any express words either in S. 10 or S. 11 or any other section of the Orissa Money-lenders Act, 1939, which would authorise the Court to do so. A large number of decisions of the Calcutta High Court have been placed before us on this point. I think it is unnecessary to consider all these decisions in detail, for the simple reason that the provisions of the Bengal Money-lenders Act are different from the provisions of the Orissa Money-lenders Act in this respect. I invite special attention to S. 30, Bengal Money-lenders Act, which relates to the re-opening of transactions. Sub-section (2) of that section of the Bengal Act clearly authorises the Court to restore the judgment-debtor's property acquired by the decree-holder in consequence of the execution of the re-opened decree. If the judgment-debtor pays to the decree-holder the amount of the new decree, then possession of the property remains with the judgment-debtor; if there is default, possession of the property comes back to the decree-holder. These and similar provisions of the Bengal Act are not to be found in the Orissa Money-lenders Act. It would not, therefore, be right to adopt the reasoning of some of the Calcutta decisions, given with reference to the provisions of S. 36 of the Bengal Act, for the purpose of interpreting the provisions of the Orissa Money-lenders Act. I propose, therefore, to examine independently the provisions of the Orissa Money-lenders Act before referring to some of the Calcutta decisions.

[5] The sections relevant for the purpose of this appeal are Ss. 16, 11 and 10. The material portion of S. 16 is in cl. (ii), which says that the provisions of Ss. 10 to 15 shall, so far as may be, apply to appeals and proceedings in execution arising in respect of decrees passed on 1st April 1936 or thereafter on the basis of loans whether such appeals or proceedings in execution were pending on, or instituted after, the date on which the said sections come into force. It is contended before us that when S. 16 makes applicable the provisions of Ss. 10 to 15, so far as may be, to pending appeals and proceedings in execution arising in respect of decrees passed on 1st April 1936, or thereafter, it means Ss. 10 to 15 as amended up-to-date, that is, as they stand on the date on which they are being applied. Assuming this contention to be correct without deciding it, the section merely takes us back to Ss. 10 and 11. We have, therefore, to see if there is anything in Ss. 10 and 11, as amended up-to-date, which authorises the Court to set aside a sale already held or disturb a title already acquired, before the coming into force of the Orissa Money-lenders Act, 1939, in the particular area from which this appeal comes. The learned Advocate-General has relied on sub-s. (2) of S. 11 and sub-s. (3) of S. 10. Both these sub-sections allow the Court to grant certain reliefs in respect of a decree passed on 1st April 1936 or thereafter on the basis of a loan, when the said decree remains unsatisfied in whole or in part on the date on which the Orissa Money-lenders Act comes into force (in the case of sub-s. (2) of S. 11) or the date on which the Orissa Money-lenders (Amendment) Act, 1947, comes into force (in the case of sub-s. (3) of S. 10). The learned Advocate-General has contended before us that the personal decree of 1942 is still unsatisfied, and, therefore, the preliminary and

final decrees passed in 1937 and 1938 also remain unsatisfied. He has referred us to the forms of decrees in Appendix D of Sch. 1, Civil P. C., particularly the forms in which decrees in a mortgage action are passed. He has referred to form No. 8, the form in which a personal decree under O. 34, R. 6 is passed, in which there is a reference to the final decree and it is stated that the balance due after the sale under the final decree is so much. The learned Advocate-General may be right in his contention that the amount payable under the personal decree is really a part of the final decree, which adjusts the total liability of the debtor to the creditor. In this view, if the personal decree remains unsatisfied, the final decree and the preliminary decree can also be said to remain unsatisfied. Accepting, therefore, this part of the argument of the learned Advocate-General, we have to consider whether the Court can give the kind of relief which the learned Advocate-General wants for his client in this case. Sub-section (2) of S. 11 entitles the Court to exercise all or any of the powers specified in sub-s. (1). That sub-section has four clauses, with two of which we are concerned. These two clauses I have already quoted in extenso in an earlier part of this judgment. I can find nothing in those two clauses which would authorise the Court to set aside a sale validly held before the coming into force of the Orissa Money-lenders Act, 1939, or to disturb a title validly acquired by such a sale. There has been some argument before us if the expression "reopen the transaction" is an independent clause, and if under that clause the Court is entitled to set aside a sale which has been held before the coming into force of the Orissa Money-lenders Act, 1939. My own view is that the expression "reopen the transaction" in cl. (i) is not an independent clause. It is followed by some other words which clearly show that the reopening of the transaction is for the limited purpose of relieving the debtor of all liability in respect of any interest in execess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan. The expressions "reopen the transaction" is followed by a comma; then there is the expression "take an account between the parties;" these two expressions merely show that the Court can do certain things in order to give a particular relief. What relief the Court can give is mentioned in the following words : "and relieve the debtor of all liability in respect of any interest," etc. It is clear to me that the reopening of the transaction which the Court can do is for the purpose of giving the particular relief which is mentioned in cl. (i). That clause does not, either by express words or necessary implication, allow the Court to set aside a sale already held before the coming into force of the Orissa Money-lenders Act or to distrub a title acquired by such a sale. If a decree passed on 1-4-1936, or thereafter on the basis of a loan remains unsatisfied, the Court can give relief to the judgment-debtor under cl. (i) of sub-s. (1) of S. 11 to the extent mentioned therein; it can reopen the transaction, take an account between the parties and relieve the debtor of all liability in respect of any interest in excess of a certain percentage. For the purpose of calculating the present liability of the judgment-debtor, the Court can do any of the things mentioned in cl. (i). There is, however, nothing in that clause which would indicate that the Court can interfere with a sale validly held or a title validly acquired before the coming into force of the Act, The sale and the title acquired thereunder have taken the matter beyond the region of contract, and it is no longer a case of reopening a transaction or taking an account between the parties. The next clause is cl. (iv), which allows the Court to set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, etc. Here, again, the security no longer exists after the mortgaged property has been sold in execution of a final decree. The security had merged into the decree, and so far as the security is concerned it has vanished by the sale of the mortgaged property. I think it will be stretching the language too far to hold that the expression "set aside either wholly or in part or revise or alter any security given" means that the Court can undo a sale which has already been held or disturb a title which has been validly acquired. There is an important proviso to sub-s. (1) of S. 11 which says that nothing contained in the sub-section shall be deemed to require the creditor to refund any sum which has been paid to him. This proviso also restricts the scope of sub-s. (1) of S. 11, and indicates that the Legislature did not intend that in the process of reopening, everything which has been done before including sales held should be disturbed. Then there is another important consideration. If the intention was that sales already held and title validly acquired thereunder before the coming into force of the Orissa Money-lenders Act, 1939, were to be disturbed one would expect certain provisions regarding third party purchasers, or *bona fide* assigns. Such provisions occur in the Bengal Act, which goes much further than the Orissa Money-lenders Act. The absence of such provisions in the Orissa Money-lenders Act, particularly in S. 11, is against the contention of the learned Advocate-General. Turning now to S. 10 of the Act, the position is the same. Sub-section (3) of S. 10

allows the Court to give such relief to the judgment-debtor as is specified in sub-s. (2). Neither sub-s. (2) nor sub-s. (3) of S. 10 say anything about setting aside a sale or disturbing a title validly acquired before the coming into force of the Act. The learned Advocate-General has laid great emphasis on the expression "and the decree shall be modified accordingly" which occurs in sub-s. (3). He says that if the decree is to be modified, it must be the preliminary and the final decrees which still remain unsatisfied; if these decrees are to be modified, then a fresh sale must be held in accordance with the modified decree. Here, again, I do not think that the words of the section justify the contention raised on behalf of the judgment-debtor appellant. The expression "the decree shall be modified accordingly" has to be read with sub-s. (2) of S. 10 and that sub-section indicates the kind of relief which can be given. I am unable to accept the contention of the learned Advocate-General that the expression means that a sale already held should be set aside or a title validly acquired before the coming into force of the Act shall be disturbed. My conclusion, therefore, is that there is nothing in the two sections 10 and 11 which would justify the Court in setting aside a sale validly held before the coming into force of the Orissa Money-lenders Act or to disturb a title validly acquired under such a sale.

[6] I now turn to some of the decisions which have been placed before us. The learned Advocate-General has placed great reliance on three decisions : A.I.R. 1944 Cal. 193;[1] A.I.R. 1944 P. C. 35[2] and A.I.R. 1942 Cal. 123.[3] The first decision is a Full Bench decision in which the principal question for consideration was formulated as follows :

"Where in a suit for the recovery of money lent upon a mortgage, the final decree was executed by the sale of the mortgaged property before 1-1-1939 (which was the relevant date under the Bengal Act), but a personal decree for the unrealised balance remained unsatisfied on that date, can the Court in exercise of its powers under S. 36, Bengal Money-lenders Act, reopen the preliminary decree and final decree as well as the personal decree so as to affect all three ?"

The answer given by the Full Bench was that each of the three decrees in the suit was a decree to which the Bengal Act applied and that none of these three decrees were fully satisfied by 1-1-1939. This decision is really a decision in favour of the learned Advocate-General so far as the first part of his contention is concerned, namely, when a personal decree passed under O. 34, R. 6, Civil P.C., remains unsatisfied it follows that the preliminary decree and the final decree also remain unsatisfied. I have already stated that this part of the contention of the learned Advocate-General may be accepted as correct. The Calcutta decision, however, is no authority for the second proposition of the learned Advocate-General that Ss. 10 and 11, Orissa Money-lenders Act, authorise the setting aside of a sale already held before the coming into force of the Act. It is true that a sale had already been held in execution of the final decree in the Calcutta case; but I have already pointed out that S. 36, Bengal Money-lenders Act, goes much further than the corresponding provisions of the Orissa Money-lenders Act, and gives the power to restore to the judgment-debtor property which had already been purchased by the decree-holder in execution of the reopened decree. Section 36, Bengal Act, also contains provisions for the protection of third party purchasers and *bona fide* assigns for value. There are no corresponding provisions in the Orissa Money-lenders Act, and the case before us must be decided on the terms of the provisions of the Orissa Money-lenders Act. The facts of the Privy Council decision on which the learned Advocate-General has relied were as follows : The plaintiff commenced a mortgage action claiming a decree for payment of Rs. 3,88,300 the amount then due to the mortgagees, on default of payment, sale of the mortgaged properties, and liberty to apply for the recovery of any balance after sale. The suit was contested and the parties arrived at a compromise agreement to be enforced by a decree, and on 4-7-1933, the decree was made on the basis of the compromise. One of the terms of the compromise was that defendant 1 shall execute in favour of the plaintiff a sale deed in respect of some villages which would be selected by the plaintiff. On 26-5-1934, the creditor applied for execution of the aforesaid decree. This application was resisted and before the execution proceedings had been determined, there came into force the U. P. Agriculturists' Relief Act of 1934. On 23-7-1935, the debtor claimed certain reliefs under Ss. 5 and 30 of the said Act. The Subordinate Judge granted those reliefs but the Chief Court at Lucknow held that the reliefs could be granted only in respect of such decrees as contained a direction for payment of money. Their Lordships did not agree with the reasoning of Chief Court. With regard to the contention that the parties should not be allowed to resile from the agreement, their Lordships observed as follows :

"This consideration appears, with respect, to be more appropriate to appeal than to revision ; but as the operation of a Relief Act is one of general importance it may be as well to point out that the object of all such Acts is to give relief from agreements made by the applicants whether under the laws relating to usury or otherwise, and that it cannot in ordinary circumstances be an objection to relief that the applicant is seeking to resile from the very agreement against which the law has expressly said he may be relieved."

No question of setting aside a sale validly held before the coming into force of the Act was under consideration in the case before their Lordships, and I am unable to deduce any such principle as is contended for by the learned Advocate-General from the decision of their Lordships of the Judicial Committee. The case in A. I. R. 1942 Cal. 123[3] was a case in which the sale was set aside: that was, however, a case in which the matter came up to the High Court when the sale was pending confirmation in accordance with the provisions of S. 35, Bengal Money-lenders Act. The matter, therefore, was at large and it was open to the Court either to confirm the sale or not to confirm it. The sale appears to have been held in that case after the Bengal Money-lenders Act had come into force, and the question of confirming the sale under that very Act was in issue. That decision can be no authority for the proposition that a sale validly held before the coming into force of the Act can be set aside under the provisions of the Act, when those provisions do not say so either in express words or by necessary implication. On behalf of the decree-holder also several decisions of the Calcutta High Court have been placed before us. As I have already stated, no useful purpose will be served in considering those decisions which were given with reference to the terms of S. 36, Bengal Money-lenders Act. I may only refer to one such decision in 49 C. W. N. 367[4] where it was held that even under S. 36, Bengal Money-lenders Act, the Court reopens a decree only for the purpose of and so far as it is necessary for giving relief to the borrower against specific evils sought to be remedied by the Act, namely, liability for interest in excess of the limits specified. It was further observed that the passing of a new decree did not mean that the old decree and all adjudications implied thereunder were totally gone, and that the parties were not relegated to their rights and liabilities on the original cause of action. The position under the Bengal Money-lenders Act has been further clarified in A. I. R. 1945 Cal. 177,[5] where it was pointed out that the right conferred on the judgment-debtor under cl. (c) of sub-s. (2) of S. 36 of the Bengal Act was in the nature of *jura in re alieno*, the title being still in the decree-holder purchaser, but burdened with the enjoyment of the judgment-debtor as long as he pays the instalments payable under the new decree; when the new decree is fully paid up he becomes the owner, for the decree-holder purchaser would not be considered to be owner, for the debt due to him in consideration of which he had purchased the property had been discharged by payment. It has, therefore, been contended by learned counsel for the decree-holder that even under the Bengal Act the title of the decree-holder under the purchase does not disappear: that title remains and possession is given to the judgment-debtor for the purpose of paying up the amount under the new decree. I do not think any useful purpose will be served by investigating further the position under the Bengal Money-lenders Act, as I am clear in my mind that S. 36, Bengal Money-lenders Act, goes much further than any of the provisions of the Orissa Money-lenders Act, and the case before us must be decided on the terms of the various sections of the Orissa Money-lenders Act and not by the principles laid down in several Calcutta decisions with reference to S. 36, Bengal Money-lenders Act. For the reasons given above, the appeal of the judgment-debtor must be dismissed.

[7] The appeal of the decree-holder can, I think, be disposed of in a few words. Learned counsel for the decree-holder contends that under S. 10 (1), Orissa Money-lenders Act, the amount of interest for the period preceding the institution of the suit cannot be greater than the amount of the loan originally advanced. He contends, therefore, that the learned Subordinate Judge should not have fixed the limit of Rs. 14,000 without taking into consideration interest pendente lite. It is sufficient to point out that the suit was brought in 1935 and the period antecedent to the institution of the suit was a period of about eight years only. Under S. 11 of the Act the Court could relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of a secured loan. The interest at that rate for a period of 8 years would be much less than Rs. 7000. Calculated at 9 per cent. per annum simple the interest on the principal sum of Rs. 7000 would be Rs. 630. The learned Subordinate Judge has allowed interest to the maximum extent of Rs. 7000, which would cover a period of more than 10 years. Therefore, I am unable to accept the contention of the decree-holder that the learned Subordinate Judge has not given her interest pendente lite.

[8] The result, therefore, is that both the appeals fail and are dismissed. In the peculiar circumstances, the parties will bear their own costs for the hearing of the appeals in this Court.

[9] **Ayyar J.**—I agree. Arguments based on analogy are sometimes apt to be misleading. The Bihar Money-lenders Act specifically exempted decrees from the operation of "reopening the transaction" and the Bengal Act in S. 36, provided, among other relief to the borrower, for the judgment-debtor being restored to possession and continuing in possession so long as he pays off the dues, as fixed by the Court. But the Orissa Act contains no provision for unsettling a sale

which has already taken place or for disturbing a valid title which has already been acquired before the relevant date, in the process of "re-opening the transaction" under S. 11 (1) (i), Orissa Money-lenders Act. The Court cannot stretch the words of a statute in such a way as to import remedies which are not specified in the statute itself.

R.G.D. *Appeals dismissed.*

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## A. I. R. (35) 1948 Patna 153 *[C. N. 54.]*

SINHA AND MUKHARJI JJ.

*Basdeo Narain Choudhury and others— Plaintiffs—Appellants* v. *Karu Mahton and others — Defendants — Respondents.*

A. F. A. D. No. 1788 of 1945, Decided on 16-9-1947, from decision of Addl. Sub-Judge, Patna, D/- 18-8-1945.

**(a) Civil P. C. (1908), S. 100 — Question of fact or law — Representation — Civil P. C. (1908), O. 1, R. 8.**

Question whether the plaintiff tenant in a rent reduction proceeding represents the whole body of tenants is a mixed question of law and fact. [Para 4]

Where the representative capacity of the plaintiff appeared to have received the sanction of the landlords inasmuch as the rent receipts were granted in his name alone, it was held, all the things considered, that the representative capacity of the tenant was well proved : 19 I. C. 989 (Cal.), *Rel. on*; 15 A. I. R. 1928 Pat. 218 and 7 A. I. R. 1920 Pat. 204, *Ref.* [Para 4]

Annotation. — ('44-Com.) Civil P. C., Ss. 100-101, N. 51, Pts. 1 and 2, O. 1, R. 8, N. 8.

**(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 112A —Rules framed by Board of Revenue, Chap. 7B, Rr. 115 and 117 — Rent reduction proceedings — Notice must be served on all landlords unless landlords served represent others.**

The underlying object of the Rr. 115 and 117 is that before the rent of a holding is proposed to be altered to the prejudice of any party it should not be done until that party had notice of the rent settlement proceedings. This is quite in accord with the fundamental principle of law that before an order is passed affecting any person that person should be given an opportunity to be heard. Where there are no less than 34 landlords, but notice is served on only two of them, and there is no evidence to show that these two latter have any valid authority to represent the entire body of landlords, the remaining 32 landlords have every right to be served with a notice so that if they wish, they can contest the proceedings : 33 A.I.R. 1946 Pat. 102 and 33 A.I.R. 1946 Pat. 15, *Expl. and Disting.* [Para 5]

The mere fact that the landlords who are served with the notice are managing on behalf of the other unserved landlords does not establish representation, specially when these landlords belong to different castes and places. [Para 5]

Thus an order passed by the revenue authorities in the Rent reduction proceedings in the absence of the unserved landlords is without jurisdiction. [Para 5]

*Cases referred* :—

1. ('13) 17 C. W. N. 833 : 19 I. C. 989, Chamatkarin Dasi v. Triguna Nath.
2. ('28) 7 Pat. 129 : 15 A. I. R. 1928 Pat. 218:109 I. C. 519, Shyam Sunder v. Gobardhan.
3. ('20) 5 Pat. L. J. 32 : 7 A. I. R. 1920 Pat. 204 : 54 I. C. 39, Beradar Singh v. Bacha Mahto.
4. ('46) 33 A. I. R. 1946 Pat. 102:227 I. C. 615, Mahomed Yunus v. Bishu Nath Singh.
5. ('45) 24 Pat. 597 : 33 A. I. R. 1946 Pat. 15:226 I. C. 144, Mahomed Yasin v. Tara Mahton.
6. ('40) 21 P. L. T. 246 : 27 A. I. R. 1940 Pat. 406 : 189 I. C. 739, Central Co-operative Bank Ltd. v. Dasarath Pandey.
7. ('41) 22 P. L. T. 374 : 28 A. I. R. 1941 Pat. 390 : 194 I. C. 99, Sree Kant Lal v. Ajodhya Singh.

*C. P. Sinha and Sidheshwar Prasad Singh* — for Appellants.

*G. P. Singh and Shashi Shekhar Prasad Singh* — for Respondents.

**Mukharji J.** — This is plaintiffs' second appeal. They brought Title Suit No. 65 of 1942 in the Court of the Munsif of Bihar for a declaration that the order of reduction of rent of a certain holding of 23.62 acres held by the defendants under them was void and without jurisdiction. There was also a claim for arrears of rent for the years 1347 to 12 annas kist of 1349. Previously there was a suit by the plaintiffs against the defendants for arrears of rent in respect of the years 1344 to 1346. In that suit the claim of the plaintiffs was reduced in accordance with the order passed by the Rent Reduction Officer. The claim of the plaintiffs in Title Suit No. 65 of 1942 also included an amount which represented the difference between the khatian jama and the reduced rental so far as these three years, namely, 1344 to 1346, were concerned. The suit was contested by the defendants on the ground that the order of the Rent Reduction Officer was perfectly valid and that the plaintiffs had no cause of action.

[2] Before I proceed further, I may mention that the annual jama of the holding besides cess was Rs. 250. The amount of cess payable annually was Rs. 3-12-0. From Exs. E and E-1, the rent schedules, it appears that the rental was first reduced to Rs. 142-6-0 and then to Rs. 124-7-0. The first reduction was under cl. (c) of S. 112A, and the second under cl. (d) of the same section. The learned trial Court gave a decree to the plaintiffs according to the reduction made under cl. (c). Both the plaintiffs and the defendants appealed against the judgment of the learned Munsif. At page 19 of the Paper Book the learned Additional Subordinate Judge who heard the appeal and the cross-objection observed as follows :

"Under such circumstances, I do not quite understand why the trial Court ignored the reduction under cl. (d) and allowed the decree at the reduced rate according to cl. (c) alone. I would, therefore, allow the cross-objection and order that the reduction under cl. (d) will also be available to the respondents."

The learned Additional Subordinate Judge thus allowed the cross-objection and dismissed the appeal.

[3] A few facts need be stated here for a pro-

per appreciation of the respective cases of the parties. The holding in question is held by as many as 24 tenants, and there are no fewer than 34 landlords. It is the admitted case of the parties that the application for reduction of rent was made only by Karu Mahton, one of the tenants. It is also an admitted fact that out of the large body of landlords only two were impleaded. These two are Basdeo Chaudhury and Kasi Chaudhury. According to the plaintiffs (*vide* para. 4 of the plaint—pp. 3-4 of the Paper-Book) Gopi Mahto and Paryag Mahton, two of the recorded tenants of the holding, are still alive. It was also the case of the plaintiffs that the heirs of some of the other recorded tenants are alive. The main ground upon which the order of the Revenue Officer reducing the rental was challenged as having been passed without jurisdiction is that all the landlords and tenants concerned were not made parties to the rent reduction proceedings. The case of the defendants, on the other hand, was that only Karu Mahto filed the application for reduction as, so it was said, Karu Mahto represented the other tenants. As for the allegation in the plaint that out of so many landlords only two were impleaded, the case of the defendants was that these two looked after the affairs of the entire body of landlords, and as such were impleaded in their representative capacity. Both the Courts below have held that there was representation and they upheld the order of the Rent Reduction Officer.

[4] On behalf of the plaintiffs-appellants it has been contended that the learned Courts below were wrong in their view that only one tenant represented all the tenants whose names find mention in the Survey Record-of-Rights. Similarly, it was also contended that there was no justification for the finding that only two landlords represented the entire body of landlords in this case. On behalf of the respondents it was argued that the question of representation is one of fact, and as such cannot be gone into in second appeal. The question of representation came up for consideration in the case reported in 17 C. W. N. 833.[1] A Division Bench of the Calcutta High Court presided over by Jenkins C. J. held that where one of a number of tenants is put forward by the rest as their representative he can be regarded as the sole tenant for the purposes of a suit for arrears of rent within Chap. 14, Ben. Ten. Act. Their Lordships further held that whether one of several tenants can be regarded as representative of the rest must depend on the circumstances of each case, and is largely, if not essentially, a question of fact. In 7 Pat. 129,[2] a Division Bench of this Court has held, whether one or several co-tenants can be regarded as a representative of the rest is a question of fact and depends on the circumstances of each case. Dealing with the case as to whether Karu Mahto represented all the tenants of the holding, the learned first appellate Court has observed as follows :

> "But the defendants have filed rent receipts (Exs. 1 series) to show that Karoo Mahton alone was recorded in the malik's sharista and all the rent receipts were granted in his name alone."

All the recorded tenants appear to be of the same family. Therefore, one need not be surprised that only one of them represented the rest. The fact that in the rent receipts the name of Karu Mahto alone finds mention goes to show that the landlord accepted Karu as representing the entire body of tenants recorded in the Survey Record of Rights. In 5 Pat. L. J. 32,[3] it was held that where five persons are entered in the record-of-rights as the tenants of a certain land a rent decree cannot be obtained in a suit against only one of them. In that case one Chatarpati Mahto was alleged to be the karta of the family, and as such entitled to act on behalf of the other recorded tenants. This was not proved and so it was held that no rent decree could be passed. In the case with which we are concerned it was alleged by the defendants that Karu Mahto was acting on their behalf. Karu Mahto is thus put forward by the remaining tenants as their representative. This representative capacity of Karu Mahto also appears to have received the sanction of the landlords, because one finds that the receipts granted by the landlords show the name of Karu Mahto alone as the tenant. The genuineness of the receipts has not been called in question. One can, therefore, safely take it that in the sherista of the landlord also the name of the tenant is Karu Mahto. All things considered, therefore, I can have no hesitation in holding that the representative capacity of Karu Mahto was well proved in this case. As for the contention that the question of representation is one of fact, I may observe that it is rather a mixed question of fact and law and not one which is purely of fact. This is borne out by the ruling reported in 17 C. W. N. 833[1] above referred to where it has been held that such a question is largely, if not essentially, a question of fact. Their Lordships in 17 C. W. N. 833[1] did not say that such a question is purely one of fact. The decision reported in 17 Calcutta Weekly Notes has been approvingly referred to in 7 Pat. 129.[2]

[5] The question next is whether two of the landlords really represented the whole body of landlords in this case, The learned Additional Subordinate Judge thought that because these two landlords were in charge of collection and managed the affairs on behalf of all the land-

lords, therefore, it can very well be said that they represented all the landlords recorded in respect of the tenure in question. No power of attorney of any kind has been proved in this connexion. Besides, one finds that the plaintiffs are of different castes and of different places. They seem to have very little in common. In such circumstances I do not see how it can be held that only two of the landlords represented the entire body of them. The Board of Revenue has framed certain statutory rules and instructions under the Bihar Tenancy Act for the guidance of Revenue Officers acting under the provisions of the said Act. Admittedly in the present case the reduction of rent was effected in accordance with the provisions of S. 112A, Bihar Tenancy Act. Rule 115 under Chap. 7B of the Rules framed by the Board of Revenue is important. According to this rule when the Governor has issued a notification under sub-s. (1) of S. 112A directing that a settlement of the rents of the occupancy holdings situated in any area or of any class or classes of occupancy holdings situated in any area shall be made, the Collector shall serve a notice by proclamation and beat of drum and by posting it in the presence of not less than two persons in some conspicuous place in each village in the area specified in such notification. The rule goes on to describe what the form of the notice will be and what it must state. Such notice is to be served at least one month previous to the date fixed for settlement of rents. Under R. 117, an ex parte order can be passed by a Revenue Officer who is to settle such rents under S. 112A; but R. 117 has got a proviso which is important. This proviso lays down that where the parties have not attended in compliance with the notice served under R. 115, the Collector shall serve on each person interested a special notice. The proviso is also to the effect that no rent shall be altered in the absence of such parties until after the service of such special notice has been proved. The underlying object of the rules is quite clear; it is that before the rent of a holding is proposed to be altered to the prejudice of any party it should not be done until that party had notice of the rent settlement proceedings. This is quite in accord with the fundamental principle of law that before an order is passed affecting any person that person should be given an opportunity to be heard. In the present case there were no less than 34 landlords, but notice was served on only two of them. There is no evidence to show that these two latter had any valid authority to represent the entire body of landlords. The remaining 32 landlords had every right to be served with a notice so that if they chose, they could contest the proceedings. In the case reported in A. I. R. (33) 1946 Pat. 102,[4] a husband was the proprietor of ten annas eight pies milkiat while his wife was the usufructuary mortgagee of the remaining milkiat. No notice of the rent reduction proceedings was served on the wife and she was not made a party to those proceedings. It was held by Beevor J. that the order passed by the Revenue Officer for a reduction of rent was without jurisdiction. On behalf of the respondents a reference has been made to the case in 24 Pat. 597.[5] Their Lordships, Fazl Ali C. J. and Imam J. were considering S. 104B, Bihar Tenancy Act. The appellant before their Lordships had withdrawn his objection, and the Settlement Officer dealt with the matter under S. 104E. The proviso to S. 104E states that no revision of an entry in a settlement rent roll shall be made until a reasonable notice has been given to the parties concerned to appear and be heard in the matter. Their Lordships observed that it was not established to their satisfaction that this proviso was not complied with. Imam J. who delivered the leading judgment next went on to observe that even assuming that the Settlement Officer revised the rent settled by the Assistant Settlement Officer without giving an opportunity to the parties to appear and be heard, it would at best be a case of exercising jurisdiction illegally and not a case of acting without jurisdiction. The learned Judge then went on to refer to the cases reported in 21 P.L.T. 246[6] and 22 P.L.T. 374[7] respectively. The observations of their Lordships just referred to were in the nature of *obiter dicta*. Besides, their Lordships were not considering the implications of the rules framed under the Bihar Tenancy Act. In my opinion the Revenue Officer who reduced the rent in this case acted without jurisdiction when he passed order in the presence of only two out of 34 landlords interested in the land in question.

[6] A point that was taken on behalf of the landlords is that the suit of the plaintiffs-appellants was barred by the principle of *res judicata*. Exhibit C is a certified copy of judgment in Rent Suit No. 3811 of 1939 brought by the present appellants against the present respondents. In that suit also the main point for consideration was whether the jama was Rs. 250 as claimed by the appellants, or it was less as claimed by the respondents. The learned Munsif by his judgment dated 15th May 1940 decreed the suit of the plaintiff at the reduced jama. It is contended on behalf of the defendants-respondents that this judgment should operate as *res judicata* because the plaintiffs did not go up in appeal against it. Certain papers were proved on behalf of the plaintiffs-appellants to show that they contested the legality of the order passed by the Revenue

Officer first before the Collector, then before the Commissioner and finally before the Board of Revenue. Exhibit D-2 is a certified copy of the decision of the Commissioner, while EX. D-3 is a certified copy of the order of the Board of Revenue. The date of EX. D-3 is 22nd November 1941. It would appear that after they had failed to obtain a favourable order from the Board of Revenue the plaintiffs-appellants filed their title suit in the Court of the Munsif at Bihar on 21st May 1942. No question of *res judicata* thus falls to be considered in this case.

[7] As I have held above that the order of the Revenue Officers is without jurisdiction, the appeal of the plaintiffs-appellants must be allowed, and it is allowed accordingly. There is a cross-objection by the defendants-respondents. It appears that although the claim was for 1347, 1348 and 12 annas kist of 1349, the learned Additional Subordinate Judge, through inadvertence, no doubt, decreed the suit for the entire year 1349. This mistake must be rectified. In other words, the suit of the plaintiffs will be decreed for the year 1347, 1348 and for 12 annas kist of 1349. The rate of cess allowed by the learned first appellate Court is also wrong. The rate allowed is Rupees 7 odd, whereas the correct rate is RS. 3-12-0. The plaintiffs-appellants will get cess at the correct rate. Thus, while the appeal of the plaintiffs-appellants is allowed, the cross-objection is also allowed. In the circumstances of the case the parties will bear their costs throughout.

[8] **Sinha J.** — I agree that the appeal should be allowed on the ground that the rent reduction proceedings were vitiated on account of the fact that all the co-sharer proprietors had not been impleaded in the proceedings taken by the tenants to get their rent reduced. It is a little surprising that the Courts below should have applied the rule of holding out by all the joint landlords of a particular landlord as their representative in their dealings with the tenants. A number of co-sharer proprietors may allow their joint property to be managed by one of them, and in that capacity that particular proprietor may be managing the zamindari and granting rent receipts on behalf of all of the co-sharers. But that arrangement will not render the *de facto* manager the representative of the entire body of co-sharer proprietors in litigations relating to the estate. In a litigation relating to the joint estate, all the joint proprietors must sue, or be sued, or one of the joint proprietors may sue on his own behalf as also on behalf of the entire estate but the co-sharers, who have not joined as co-plaintiffs, must be impleaded as defendants, popularly known as *pro formâ* defendants, that is to say, they must be on the record of the proceedings either as plaintiffs or as defendants. I have not come across a single case, except the present, where it has been successfully contended that, out of a large number of co-sharer proprietors, one of them may sue, or be sued, in his own name for a certain relief in respect of the joint estate in a representative capacity so as to render the judgment given in that suit binding on all the co-sharers, some of whom may not even have been impleaded at all. The tenancy law, for example, S. 188, Bihar Tenancy Act, contemplates that, where there are a number of joint landlords interested in an estate, if they sue under the provisions of the Act, they must act together or, in certain proceedings, one or more such co-sharers may move the Court making all the remaining co-sharer landlords party defendants to the proceeding. In the present case, only two, out of a large body of co-sharer proprietors, were impleaded in the rent reduction proceedings. The Courts below seem to have taken the view that they were sued in a representative capacity. I fail to see how that position can be taken. It is open to the co-sharers to execute a power of attorney, special or general, in favour of one, or some of them, to act on behalf of all of them. But even then it is necessary in law, in order to bind all of them, to name all of them as parties to the proceedings, even though only the one, who holds the power of attorney, may prosecute or defend the suit, as the case may be, in the name, and on behalf, of all of them by virtue of the power of attorney. In the present case, it has not even been claimed that all the joint-landlords had executed such a general power of attorney in favour of those two who had been specifically named as opposite party in the rent reduction proceedings. In my opinion, even if they had executed such a power of attorney, that would have availed only to this extent that they could have represented all the landlords in the proceedings, and taken steps to prosecute their defence only if all of them had been named as parties to the proceedings. It is not a case like that of the karta of a joint Hindu mitakshara family, who represents the entire family, and can sue, or be sued, in his name alone so as to bind the entire coparcenary. Hence, in my opinion, the Courts below have completely misdirected themselves in applying the rule of representation to the present case.

[9] On the question of whether one of a large number of tenants, who have all been recorded in the finally published record-of-rights as jointly interested in the holding, could have acted in a representative capacity, I reserve my opinion, as the question need not be decided in this case. It is enough to base the judgment in the present case on the simple fact that all the co-sharer

proprietors were not impleaded in the rent reduction proceedings. It may be that, in the case of a joint Hindu Mitakshara family, the karta of the family, which is the owner of the holding, may represent the entire family in relation to the landlords. But where the body of joint tenants is not a joint Hindu family, and if all of them are shown in the finally published record-of-rights as joint tenants of the holding, it becomes a moot question whether or not the record-of-rights supersedes the landlords' private papers. I need not pursue this matter any further in view of the consideration that the question need not be decided in the present case.

[10] The matters raised in the cross-objection were practically conceded by the learned advocate for the appellants, who rightly pointed out that the mistake as regards the rent for the kist of 1349 Fasli was a clerical one. As regards the rate of cesses for the purposes of the Cess Act, the holding has been treated as a tenure as understood in that Act, and, hence, the learned Subordinate Judge was mistaken in allowing cesses at one anna per rupee.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 157** *[C. N. 55.]*

AGARWALA Ag. C. J. AND MANOHAR LALL J.

*Abdul Sakur — Defendant — Appellant* v. *Pratab Udainath Sahi Deo, Plaintiff and others, Defendants — Respondents.*

Letters Patent Appeal No. 16 of 1946, Decided on 16-9-1947, from judgment of Imam J., D/- 25-2-1946.

**Landlord and Tenant — Original rent not lump sum but at certain rate per acre — Dispossession from small part not due to force or deliberation — Tenant, if entitled to suspension of rent.**

To constitute eviction of the nature entitling to a total suspension of rent, the act of the landlord must be forcible or at any rate tortious. Where the original rent was at a certain rate per acre, and there had been dispossession by the landlord from a small part of the holding, which dispossession was the result of inadvertency and not of force or deliberation and, there had been no impairment of the value of the holding by the dispossession from a minute portion of it :

*Held* that the tenant was not entitled to suspension of the entire rent o the holding but only to a proportionate reduction of rent : 21 A. I. R. 1934 Pat. 653, *Foll.*; 28 A.I.R. 1941 Pat. 417, *Ref.* and 26 A.I.R. 1939 Pat. 356, *Disting.* [Para 2]

*Cases referred* :—

1. ('34) 13 Pat. 396: 21 A.I.R. 1934 Pat. 653 : 152 I.C. 992, Rameshwar Lal v. Butto Kristo Rai.
2. ('41) 22 P. L. T. 310 : 28 A.I.R. 1941 Pat. 417: 193 I.C. 250, Basanti Lal v. Jamuna Prasad.
3. ('39) 20 P. L. T. 378 : 26 A.I.R. 1939 Pat. 356: 180 I.C. 98, Mt. Deoki Kuer v. Shiva Prasad Singh.

*L. K. Choudhuri* — for Appellant.

*B. C. De and A. K. Chatterji* — for Respondents.

**Agarwala Ag. C. J.**—This is an appeal under the Letters Patent by the defendant against a decision of Imam J. The appeal arises out of a suit by the plaintiff for recovery of rent for the years 1995 to 1997 sambat. The area of the holding was 55 acres. The defence of the defendant was that he had been dispossessed of .8 acre and that he was, therefore, entitled to suspension of the entire rent of the holding. The Courts below allowed him proportionate reduction of rent, holding that the dispossession had not been tortious, that the rent was not a lump sum rent but at the rate of so much per acre, and that the equitable course was to permit a proportionate reduction. That decision has been upheld by Imam J, who observed that the original rent was at a certain rate per acre, and that even if there has been dispossession by the landlord from a small part of the holding, the dispossession was the result of inadvertency and not of force or deliberation, and, lastly, that there has been no impairment of the value of the holding by the dispossession from a minute portion of it.

[2] In 13 Pat. 396[1] it was held by a Division Bench of this Court, of which I was a member that to constitute eviction of the nature entitling to a total suspension of rent the lessee must establish that the lessor, without his consent and against his will, wrongfully entered upon the demised premises and evicted him. In other words, to justify withholding of the rent, the act of the landlord must be forcible or at any rate tortious. It was pointed out that there are certain exceptions to the rule that a lessee is entitled to a total suspension on partial eviction and where the Court will be entitled in equity to give a decree for rent only in respect of the portion of the leasehold property of which the tenant has been in undisturbed possession. In 22 P. L. T. 310[2] the facts were that the plaintiff sued for recovery of rent of a sub-tenure of which he had himself recovered a part of the rent to which the defendant was entitled, under a mistake. It was held that, as the plaintiff had not deliberately intended to dispossess the defendant from any portion of the sub-tenure, the latter was not entitled to a suspension of the rent of the sub-tenure. Reference was also made to a decision in 20 P. L. T. 378.[3] That, however, was a case where the rent of the holding was a lump sum rental and the dispossession was tortious. The present case falls within the principles of the decision in 13 Pat. 396,[1] and must, therefore, be dismissed with costs.

**Manohar Lall J.**—I agree.

R.G.D. *Appeal dismissed.*

**A. I. R. (35) 1948 Patna 158** *[C. N. 56.]*

MANOHAR LALL AND AYYAR JJ.

*Gouri Kant Prasad — Appellant* v. *Rambilas Narain and others—Respondents.*

A. F. A. O. No. 69 of 1946, Decided on 1st August 1947, from order of Addl. District Judge, Muzaffarpur, D/- 22-12-1945.

Limitation Act (1908), Art. 182 (4) — Decree assigned—Assignee's name not substituted — Application for execution by assignee in his own name —During pendency decree got amended — Fact of amendment brought to notice of Court and judgment-debtor — No application for amendment of execution petition—Petition held one for execution of amended decree and not barred by time.

One *D* obtained a preliminary mortgage decree against *R* and before it was made final he assigned it to *G* who applied for making it final. He subsequently applied for a personal decree under O. 34, R. 6, Civil P. C. and such a decree was passed on 12th June 1940, but in that decree the name of *D* was shown as the decree-holder instead of that of *G*. Two execution petitions by *G* in his own name were dismissed. In the mean time on 28th July 1943, *G* had applied for amendment of the decree. *G* filed a third execution petition on 28th September 1943 again in his own name and while this was pending he got the decree amended on 20th May 1944 and the attention of the Court was pointedly drawn to the fact of the amendment and the judgment-debtor raised an objection that the amendment should not have been allowed. The question was whether the application was barred by time :

*Held* that the application for execution was not barred by limitation. Although there was no application for the amendment of the execution petition after the amendment of the decree, the attention of the Court having been drawn to the fact that the decree which was being executed was the decree as amended on 20th May 1944, it must be held that the parties understood that the Court allowed the application for execution to be treated as if it were an application for execution of the decree of 20th May 1944. Hence, the decree which was being executed was the amended decree, and in the circumstances, the application for execution must be treated to be an application for execution of the amended decree as and after 20th May 1944:23 A.I.R. 1936 Mad.434, *Disting.*- [Paras 10 & 11]

Annotation : ('42-Com.) Lim. Act, Art. 182 N. 50.

*Cases referred* :—

1. ('36) 23 A. I. R. 1936 Mad. 434 : 161 I. C. 969, Administrator General, Madras v. Radhakrishna Chettiar.
2. ('34) 57 Mad. 795 : 21 A. I. R. 1934 Mad. 283 : 148 I. C. 1088, Thiyagaraja Thevar v. Sambasiva Thevar.

*B. C. De* — for Appellant.

*S. K. Mitra and Nand Lal Umtwalia* — for Respondents.

**Manohar Lall J.**—This is an appeal by the decree-holder who is aggrieved by the order of the learned Additional District Judge of Muzaffarpur who reversed the decision of the learned Munsif of Muzaffarpur and held that the execution of the decree was barred by limitation in the circumstances about to be narrated.

[2] It is enough to state that one Deotanand obtained a preliminary mortgage decree against Rambilas and Singheshwar on 4th January 1937, and before it was made final, he assigned it to Gouri Kant Prasad, the appellant before us. Gouri Kant Prasad applied for the decree to be made final in August 1938, and in December 1939, he made an application for a personal decree under O. 34, R. 6, Civil P. C. We are concerned in the present case with the execution of the personal decree pronounced on 12th June 1940. But unfortunately in the preparation of that decree the office showed the name of the original preliminary decree-holder Deotanand as the decree-holder instead of Gouri Kant Prasad in whose favour the Court directed that the decree should now be prepared.

[3] The first application for execution was filed on 30th April 1941 by Gouri Kant Prasad, but the draft of that application omitted to relate that the decree under execution stood not in the name of Gouri Kant Prasad but in the name of Deotanand. This application was dismissed for default on 12th July 1941.

[4] On 19th September 1941 again, another application for execution was filed by Gouri Kant Prasad. The judgment-debtor objected that this application was not maintainable as the applicant was not the decree-holder. On 28th July 1943 the applicant filed an application for amendment of the decree before the Munsif in his original jurisdiction. The application for execution, however, was dismissed two days after, that is 30th July 1943, on the ground that the applicant was not the person in whose name the decree stood. With regard to the application for amendment, the learned Munsif observed :

"It appears that after the hearing of this miscellaneous case Babu Gouri Kant has applied for amendment of the decree but the amendment cannot be made without giving notice to all the judgment-debtors who are several and one of them is insane and is lodged in the Mental Hospital at Kanke."

[5] The appellant then filed a third application for execution on 28th September 1943, again not in the name of Deotanand but in his own name. The judgment-debtor promptly took objection under S. 47, Civil P. C., that the application for execution was not maintainable as the applicant was not the decree-holder and also that one of the judgment-debtors was insane at the time of the decree and, therefore, the decree was void and unexecutable against him. While the execution case and the miscellaneous case were pending, the applicant got the decree amended on 20th May 1944 from the Subordinate Judge, who was temporarily in charge of the office of the Munsif who had passed the decree during his absence on leave. The judgment-debtor then filed another miscellaneous case before the Munsif who was also executing the decree and prayed that the order of amendment dated 20th May 1944, which was passed without giving notice to him should be re-called.

[6] The executing Court decided the two miscellaneous cases by an order dated 22nd November 1944. He framed three points for his decision: (1) whether the order of amendment of 20th May 1944 was liable to be re-called, (2) whether the decree was void against the lunatic, and (3) whether the execution was barred by limitation. He held that the order of amendment could not be re-called, that the decree against defendant Sidheshwar was void and unexecutable, but the decree being not barred by limitation was executable against the other judgment-debtor.

[7] From this decision two appeals were preferred to the learned District Judge, one by Rambilas and the other by the decree-holder who was aggrieved by that portion of the decision of the Munsif that the decree was void against the lunatic. The learned Judge in a considered and able judgment reversed the finding of the learned Munsif on the second and third points and held that the decree was not void and that this objection could not be entertained by the executing Court and that the execution of the decree was barred by limitation. Hence, the appeal to this Court by the decree-holder. There is no cross-appeal on behalf of the judgment-debtor.

[8] The only question, therefore, which we have to consider is whether in the circumstances that I have narrated above, the execution of the decree was barred by limitation.

[9] The argument on behalf of the appellant is that as the Court ultimately amended the decree on 20th May 1944, the amendment enured to the benefit of the decree-holder and all the previous execution cases which were all filed in the name of the ultimate and real decree-holder should be taken into consideration to enable the last execution to be treated as within time. To this the learned Government Advocate rightly objected by pointing out that the previous execution cases being by a person who was not the decree-holder on the dates of those applications could not be treated otherwise than as of no effect. He also urged, the present execution started on 28th September 1943, being more than three years from the date of the decree should be held to be barred by limitation, and relied upon the case in A. I. R. 1936 Mad. 434[1] in support of his contention that the amendment of the decree after the date of application for third execution could not enure to save limitation. To this Mr. B. C. De replied that in any event the application for the third execution should in the circumstances be treated as a proper application as it was still pending when the amendment of the decree was allowed by the Subordinate Judge.

[10] Having considered the matter, I am of opinion that the application for execution was not barred by limitation. The attention of the executing Court was pointedly drawn to the fact that the defect in the decree which was being executed had been removed by reason of the amendment by the Court on 20th May 1944, and indeed the judgment-debtor was so alive to this that he urged that the amendment should not have been allowed and the application for execution all along contained the name of the decree-holder who ultimately was formally recorded to be the real decree-holder on 20th May 1944. The learned Government Advocate argued that there had been no application for the amendment of the execution petition after the decree was amended, but in my opinion, in the circumstances of this case, attention of the Court having been drawn to the fact that the decree which was being executed was the decree as amended on 20th May 1944, it must be held that the parties understood that the Court allowed the application for execution to be treated as if it were an application for execution of the decree of 20th May 1944. The judgment-debtor, it may also be observed, had taken a serious objection as the very first point in the case, namely that the amendment of 20th May 1944 ought not to have been allowed and should be re-called.

[11] In this view of the matter, the case relied upon by the learned Government Advocate does not assist him. In A. I. R. 1936 Mad. 434[1] it was pointed out in the right hand column of p. 434 that no application had till then been made by the appellant either for the execution of the amended decree or for the amendment of the execution petition, and the case in 57 Mad. 795[2] was thus distinguished by the learned Judges. In the present case, as already observed, the decree which was being executed was the amended decree, and in the circumstances, the application for execution must be treated to be an application for execution of the amended decree as and after 20th May 1944.

[12] I would, therefore, reverse the decision of the learned Additional District Judge and restore the decision of the learned Munsif on the question of limitation. The decision of the learned Additional District Judge as to the executability of the decree against the lunatic is not the subject of any appeal before us.

[13] The real difficulty in the case having arisen due to the carelessness of the appellant, I would direct that each party will bear his own costs of this Court of the execution proceedings of 1943 but the appellant will get the costs in the Courts below.

**Ayyar J.** — I agree.

S.C. *Appeal allowed.*

**A. I. R. (35) 1948 Patna 160** *[C. N. 57.]*

SINHA AND BENNETT JJ.

*Kamakshya Narain Singh* — *Appellant* v. *Kheya Mian*—*Respondent.*

A. F. A. D. No. 157 of 1944, Decided on 28-1-1947, from decision of Sub-Judge, Hazaribagh, D/- 18-11-1943.

(a) Bihar Court of Wards Manual, 1941, R. 65 — Construction of.

Construing R. 65, Court of Wards Manual, with reference to Ss. 15, 16, 18 and 39, Court of Wards Act, 1879 (Beng. Act IX of 1879), it is clear that the manager holds delegated power from the Board of Revenue, acting as the Court within the meaning of the said Court of Wards Act, to make settlement or re-settlement, as the case may be, in respect of holdings carrying a maximum rent of Rs. 50 a year. [Para 5]

(b) Bihar Court of Wards Manual, 1941, R. 241 —Settlement of zirat and bakasht land by manager for a term exceeding one year — Chota Nagpur Tenancy Act (6 [VI] of 1908), Ss. 17 and 19.

The manager of Court of Wards estate purported to make a settlement of land comprising of *zirat* and *bakasht* land, for a term exceeding one year carrying a rent of less than Rs. 50. No registered document was executed. The transferee held possession of the lands for more than 12 years. In a suit for ejectment brought by the proprietor within 3 years of his attaining majority and assuming management of the estate :

*Held*, that R. 241, not having been complied with, the settlement in respect of the *zirat* lands was *ultra vires*. But in respect of the *bakasht* land, the transferee acquired occupancy rights. The fact that the estate was under the management of the Court of Wards, could not operate to prevent the acquisition of occupancy rights. The suit, therefore, succeeded in respect of the *zirat* portion but not in respect of the *bakasht* portion of the holding. [Paras 5, 6, 7]

*L. K. Jha and S. P. Singh*—for Appellant.

**Sinha J.**—This is a plaintiff's second appeal from the concurrent decisions of the Courts below dismissing his suit in ejectment.

[2] It appears that the appellant, who is the proprietor of the Ramgarh Estate, came to manage his own estate sometime in year 1937, after the estate had been released by the Court of Wards which held possession of the estate for more than twelve years before the proprietor himself assumed management of the estate on attainment of majority. During the management of the estate by the Court of Wards, sometime in the year 1923, the Manager, Court of Wards, made a settlement, or purported to make a settlement, of 7.01 acres of land at an annual rent of Rs. 8-4. The lands thus settled comprised an area of 5.13 acres in khata No. 3 which is recorded in the finally published record-of-rights as proprietor's privileged land (zirat proprietor) as also of lands in khata No. 4 recorded as *bakasht* in the same record. The holding was purchased by the defendant in execution of a certificate obtained by the Manager, Court of Wards, for arrears of rent from the original tenant. The suit was instituted by the proprietor for ejectment on the ground that the settlement was *ultra vires* of the Manager.

[3] The Court of first instance took the view that the settlement was *ultra vires* of the Manager in respect of the *zirat* portion of the lands in question but not so in respect of the bakasht portion; but the learned Munsif dismissed the suit on the ground that the suit was barred by limitation so far as the *zirat* portion was concerned in view of the provisions of S. 17, Chota Nagpur Tenancy Act.

[4] On appeal by the plaintiff, the learned Subordinate Judge dismissed the suit, but on different grounds, so far as the *zirat* portion was concerned. He came to the conclusion that the settlement was not *ultra vires* of the Manager so far as the lands of khata No. 3 recorded as *zirat* were concerned. His finding was based on a construction of the relevant rules framed under the Court of Wards Act, which I shall presently refer to. Having thus lost in both the Courts below, the plaintiff has come to this Court in appeal.

[5] It has been contended, in the first instance by Mr. L. K. Jha that R. 72 of the old Court of Wards Manual corresponding to R. 65 of the current Manual is *ultra vires* of the Court of Wards Act itself. The argument has been advanced on the following grounds. It has been contended that under S. 15, Court of Wards Act, the Court, which ordinarily means the Board of Revenue under the Court of Wards Act, could delegate its powers under the Act to Commissioners of Divisions or Collectors of Districts but not to the Manager, as he is not a person appointed under the provisions of S. 15 itself. It has also been argued that the rules went beyond the powers conferred by the rule-making section, namely, S. 70 of the Act, in so far as the rules conferred on the Manager complete discretion to make settlements or re-settlements with raiyats in respect of holding carrying a maximum rent of Rs. 50 a year, and that, as these settlements were not subject to the discretion of the Collector or the Commissioner or the Board of Revenue the Manager has unrestricted discretion to grant settlements up to Rs. 50 by way of annual rent, and that such an unrestricted discretion let in the door to abuse of that power. Here, we are not concerned with the *mala fides* of the acts of the Manager. The question of *mala fides* does not appear to have been agitated in the Courts below, and, therefore, we need not make any further reference to it. But, construing the R. 65, aforesaid with reference to the provisions of Ss. 15, 16, 18 and 39, Court of Wards Act, it is clear that the manager holds delegated power from the Board of Revenue, acting as the Court within the meaning of the Court of Wards Act,

to make settlement or re-settlement, as the case may be, in respect of holdings carrying a maximum rent of Rs. 50 a year. But R. 241 provides the ordinary mode for creating a lease in favour of every raiyat in terms of S. 44, Chota Nagpur Tenancy Act, which provides for a written document evidencing the terms of the settlement. If the settlement was for a term of years exceeding one year, it should have been by a registered document. There could be an oral lease only in so far as it could be for a term of one year only. In the absence of a written and registered document evidencing the settlement, it must be held that the settlement was made by the manager in accordance with the rules laid down in the Court of Wards Manual, particularly R. 241 which is equivalent to R. 228 of the old Manual. Under that rule, the manager, should have got a registered document executed evidencing the terms of the lease. That provision of the rules not having been complied with, the settlement in respect of the zirat lands was *ultra vires*. But the same considerations cannot apply to the settlement in so far as the bakasht portion was concerned. That was land from the raiyati stock of the village which could have been settled or resettled in the ordinary course of business even for a year with a raiyat who may have been a settled raiyat of the village. In this case, the bakasht portion has been in possession of the defendant for more than twelve years. So, in any view of the case, he has acquired occupancy rights in the bakasht portion of the holding.

[6] As I have already held that the settlement of the zirat portion of the holding was in excess of the powers conferred upon the manager, the same must be set aside as illegal.

[7] Now, the question arises whether, on this finding, the entire settlement should be set aside, or only the portion relating to the *zirat* lands. This is a suit in ejectment, and the plaintiff must succeed on the strength of his own title, that is to say, only if he succeeds in making out that the defendant is a trespasser, or that he is a tenant who is not entitled to continue in possession with reference to the provisions of the Chota Nagpur Tenancy Act. As regards the *bakasht* portion of the holding, the defendant has acquired occupancy rights and it cannot, therefore, be said that the defendant is a trespasser qua the plaintiff. Mr. Jha argued that the plaintiff has brought the suit within three years after attaining majority. That may be so; but, if the defendant had acquired occupancy rights in the land during the period the estate was held by the Court of Wards through the manager, the plaintiff cannot be held entitled to eject the defendant. The simple fact that his estate was under the management of the Court of Wards cannot operate to prevent the acquisition of occupancy or non-occupancy rights, as the case may be, in lands held by the tenant for the time being. It must, therefore, be held that the suit cannot succeed in respect of the bakasht portion of the holding; but, as already indicated, the suit must succeed in respect of the zirat portion, namely, in respect of the lands comprised in khata No. 3. As to on what terms the tenant would hold the bakasht portion of the holding, we need not determine in the present suit. It may be that the landlord may have to institute a suit for ascertainment of a fair and equitable rent in respect of that portion which has been adjudged to have been held by the defendant in his occupancy rights.

[8] As a result of these considerations, the appeal in respect of the *zirat* portion, namely, khata No. 3 is allowed; but, as there is no appearance on behalf of the respondent, there will be no order as to costs in this Court. As regards the costs in the Courts below, the plaintiff will be entitled to two-thirds of the costs in those Courts. The suit, therefore, for ejectment and for mesne profits is decreed for the portion of the lands as indicated above. The appeal is accordingly allowed in part.

**Bennett J.**—I agree.

V.B.B. *Appeal partly allowed.*

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## A. I. R. (35) 1948 Patna 161 *[C. N. 58.]*

RAY J.

*Madan Mohan Prasad Singh — Appellant*
v. *Mt. Baso Kuer and others — Respondents.*

Appeals Nos. 337 and 338 of 1945, Decided on 8-1-1947, from appellate decree of Addl. Sub-Judge, Patna, D/- 19-2-1944.

(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 112A —Rent-reduction proceeding not prosecuted against entire body of landlords is void.

It is the fundamental principle of law that no order or decision of any tribunal is binding against any party who has not been given an opportunity of being represented in the proceeding in order to have his case adjudicated by Court. Thus if a rent-reduction proceeding is not prosecuted against the entire body of landlords, the proceedings would be void and will not be binding even against the cosharer landlords who have been impleaded: 33 A. I. R. 1946 Pat. 102, *Rel on.* [Para 5]

(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 148A —Object of suit under—Suit for rent by one landlord against tenant — Other landlords joined as defendants—Suit decreed —Appeal by tenant without joining other landlords is incompetent.

The whole object of the particular frame of the suit enjoined by the provisions of S. 148A is that the question as to what is the rent payable and what is the rent due will be considered finally and once for all as between the landlords as a whole and the tenants. [Para 7]

Where one of the landlords files a suit against the tenant for realisation of his share of the rent at a certain rate and joins the other landlords as party defendants and a decree is passed on the basis of the rate of rent

claimed by the plaintiff, an appeal by the tenant from such decree but without impleading the other co-sharer-landlords as respondents is incompetent, as the presence of the other landlords cannot be ignored on the ground that no relief is sought against them by the plaintiff.

[Para 7]

*Cases referred :—*

1. ('46) 33 A. I. R. 1946 Pat. 102 : 227 I. C. 615, Mohammad Yunus v. Bishunath Singh.
2. ('46) 25 Pat. 84 : 33 A. I. R. 1946 Pat. 298 : 223 I. C 297, Tahal Mahton v. Lachco Mahton.

*Rajkishore Prasad and G. N. Prasad* — for Appellant.

*Lalnarayan Sinha* — for Respondents.

**Judgment.**—The plaintiff-landlord is the appellant and the appeals arise out of two suits for recovery of rents. In the one the plaintiff claimed rent at the rate of Rs. 83-9-18 dams and in the other he claimed at the rate of Rs. 93-4-0. The suit was framed in accordance with the provisions of S. 148A, Bihar Tenancy Act, being co-sharer landlord as the plaintiff is. He impleaded the other co-sharers as parties defendants. The plaintiff claimed for an amount in proportion to his share in the proprietary interest, out of the rents due at the rates mentioned above.

[2] The tenants defendants pleaded that the rents of the holding had been reduced in a rent reduction proceeding. According to them, the reduced rent in one case was Rs. 51-9-0 in the place of Rs. 83-9-18 dams and in the other case it was Rs. 81-10-0 in the place of Rs. 93-4-0. In the first mentioned case the reductions were under two different clauses of S. 112A, namely, S. 112A; sub-s. (1), cl. (d) and S. 112A, sub-s. (1), cl. (c-II) and in the other case the reduction was under S. 112A (i) (c-II).

[3] The learned trial Court gave the plaintiff in each case a decree at the rates claimed and refused to give effect to the reductions as pleaded by the defence on the ground that the Commissioner had cancelled the reductions and in compliance with the Commissioner's decision the rent reduction schedule as a whole had been cancelled.

[4] The defendants took the matter up in appeal but failed to implead the co-sharer landlords defendants as respondents. The learned lower appellate Court gave effect to the reductions, holding that according to the settled view of this Court, the Collector's order reducing the rents as claimed by the defendants, passed in appeal, was final and the Commissioner had no jurisdiction to interfere. As against this decision, the plaintiff-landlord has preferred this second appeal. Originally in the memorandum of appeal he had impleaded the co-sharers as respondents 3 to 6, but it being pointed out in the stamp report by the office that respondents 3 to 6 were not parties in the appellate decree, they were given up.

[5] In this state of things I had to hear the appeal, in which I briefly mention the contentions that were raised by Mr. Rajkishore Prasad, the learned counsel for the appellants. His contention was that Collector's order is without jurisdiction because while there was evidence on record which constituted materials for consideration, under cl. (d) of sub-s. (1) of the section, as it was later pointed out by the Commissioner in his revisional order, he said that there were not such materials. Under the circumstances, he having acted without jurisdiction, it was quite open to the Commissioner, having power of superintendence, to force him to exercise the jurisdiction. In order to make the position clear, it is just necessary to state what are the requisites under the clause which give the Rent Reduction Officer jurisdiction to reduce the rent under it. The clause requires that there must have been a fall "in the average local prices of staple food crops during the currency of the present rent," in order to confer jurisdiction on the Rent Reduction Officer to reduce the rent. The primary Court had held that the rent as claimed by the plaintiff had been current from before the record of rights, and, therefore, there had been no fall in the prices during the currency of the present rent. From what time the present rent had been current was evidenced by "the rent attestation notes" relied upon by the trial Court and those rent attestation notes were completely ignored by the Collector who said that they were not available before him. The Commissioner points out that they were there in the record of certain connected appeals which were before him. It was further argued that the rent reduction schedule having been cancelled either rightly or wrongly by the revenue Court having jurisdiction over the matter, though it may be that it was done on a wrong interpretation of the Commissioner's order the order of cancellation must be held binding against the parties. Lastly, it was argued that the entire body of landlords had not been impleaded as parties in the rent reduction proceeding, and, therefore, the entire proceeding and any decision arrived at by any Court in such a proceeding must be taken to be without jurisdiction. For this he relies upon a case of this Court A. I. R. 1946 Pat. 102.[1] Quite apart from this decision, from common sense point of view it would be absurd to think that the rent of any holding should be reduced in a proceeding started against some of the co-sharer-landlords resulting in the anomalous, rather absurd, position that some landlords realise rent at reduced rate while others will continue to realise at the original (higher) rate. If it be a fact that the proceeding was not prosecuted against the entire body of landlords, the proceeding would be held to be void and will not be binding even against the co-sharer landlords who have been

impleaded. It is the fundamental principle of law that no order or decision of any tribunal is binding against any party who has not been given an opportunity of being represented in the proceeding in order to have his case adjudicated by the Court.

[6] In proof of the correctness of his last ground he filed certain public documents including certified copies of the D register and a petition for additional evidence. But in consideration of the view that I am taking of this appeal, the points need not be considered at present.

[7] The appeal before the learned lower appellate Court preferred by the defendants was incompetent in the absence of the other co sharer-landlords who had been impleaded as defendants in pursuance of the provisions under S. 148A. Their presence could not be ignored on the ground that no relief was sought against them by the plaintiff. The whole object of the particular frame of the suit, enjoined by the provisions of S. 148A, is that the question as to what is the rent payable and what is the rent due will be considered finally and once for all as between the landlords as a whole and the tenants. Under the circumstances, the decision passed by the trial Court holding that the rent payable was at the rate claimed in the plaint, was not only for the benefit of the plaintiff but also for the benefit of the other co-sharer-landlords. When against such a decision an appeal is preferred and the co-sharer-landlords are omitted from being impleaded as party respondents, it will be quite open for them to urge successfully in any suit or proceeding for recovery of their share of rent that the matter, that is, what is the rent payable for the holding is barred by *res judicata* by the decision of the trial Court even though they were defendants along with the tenants. In fact the issue tried in the case was an issue not only as between the tenants, but between the one set of defendants, the tenants and the co-sharers, the other set of defendants Under the circumstances, in order to avoid two inconsistent decrees in the same suit, it is not permissible that an appeal should be maintained against some of the necessary parties while the decree appealed against would be final against the other. In this view this appeal can be allowed and the decree of the lower appellate Court vacated and that of the trial Court restored, but as such a course may be rather very hard for the tenant-defendants and that it may be due to wrong advice in the lower appellate Court, I propose to send the case back directing that the appellants would implead the co-sharer landlords as party-respondents. After they are effectively impleaded and due notices of the appeal are served upon them, the appeal will be reheard by the lower appellate Court. I do not propose to give him any guidance at this stage as to the correctness of the contentions raised except what I have said above. The petition for additional evidence will have to be renewed before him. I think this course will be more appropriate because in any view the tenants in order to get their defence accepted must have to satisfy the Court that the defendant-landlords were bound by the rent reduction proceeding.

[8] I have forgotten to mention that Mr. Rajkishore Prasad brought to my notice in course of his arguments a case of this Court, 25 Pat. 84,[2] and he relied upon a passage appearing at p. 88 and urged that it was quite open to the civil Court to come to its own decision as to whether the Collector did or did not act without jurisdiction; in other words, he means to contend that for the purpose of an appeal or revision from it a Collector's decision may be final but it has no finality if it is without jurisdiction when questioned in any proceeding in the civil Court. The passage on which he relies is:

"On the other hand the learned Advocate-General who appears for the respondents contended firstly, that the orders of the Commissioner and the Board of Revenue were not without jurisdiction and that the order of the Collector having been vacated, the civil Court had to come to its own finding on the point on which it was invited to give its decision; and, secondly, that even if the order of the Collector is assumed to be a good order, it was open to the Civil Court to decide that the Collector had acted without jurisdiction in reducing the rent of the two holdings inasmuch as the Rent Reduction Officer had no jurisdiction to reduce the rent of holdings which were not held on cash rent. For the latter proposition the learned Advocate-General relied on .... Now I do not suggest for a moment that the second point raised by the learned Advocate-General is not a substantial one but I do not propose to discuss it because in my judgment his first point is sufficient to dispose of these appeals."

In giving effect to the first point, the Court held that if the Commissioner or the Board of Revenue reversed an order of the Collector on the ground of lack of jurisdiction, the Civil Court may give effect to it. This question has to be considered by the learned lower appellate Court while considering the validity of the Commissioner's order, that is to say, to try and find out whether the Commissioner's order was on a point where the Collector had acted without jurisdiction in refusing to consider the existence or otherwise of the very circumstances which only could give the Collector jurisdiction to proceed to reduce the rent.

[9] In the result, the appeal is allowed and the judgment of the lower appellate Court is set aside and the case is remitted back to him for disposal according to law after following the directions given above. Costs will abide the result.

N.S.D. *Appeal allowed.*

## A. I. R. (35) 1948 Patna 164 [C. N. 59.]

RAY J.

*Kanailal Karmakar*—*Petitioner* v. *Governor General for India in Council and others*—*Opposite Party.*

Civil Revn. No. 324 of 1946, Decided on 20-8-1947, from order of Dist. Judge, Purulia, D/-19-1-1946.

(a) Civil P. C. (1908), S. 80—Construction—Scope — Mere defect in contents of plaint as to service of notice — Effect — Proper procedure — Civil P. C. (1908), O. 7, R. 11.

The first part of S. 80 deals with the service o notice in writing, and the second part with a rule o procedure as to what should the plaint contain. The mandatory words "No suit . . . writing" in the first part cannot be read as prefatory to the second part of the section. From the very language of the two parts, their respective significance will appear to be widely divergent. The one affects the plaintiff's right to sue, while the other relates to a matter of procedure. The second part may be classed with certain rules of procedure as to the contents of a plaint prescribed in O. 7 of the Code. [Para 2]

Particularly, in a tenchical matter like one under S. 80, it should be borne in mind that rules of procedure are meant to advance the cause of justice but not to fetter it. In construing the word used in the the plaint with regard to the delivery of notice, the real context is the provisions of S. 80 of the Code. The defect in the contents of the plaint such as where the plaintiff states that he "served a registered postal notice with an acknowledgment due" instead of stating that the notice was "delivered", does not go to the root of the plaintiff's right to sue and the plaint at the most would be considered defective within the meaning of O. 7, R. 11, and the proper order to be passed would be one under O. 7, R. 11 and not to dismiss the suit on the technical ground that S. 80 was not strictly complied with. [Paras 3 & 4]

As a matter of fact it cannot, in such a case, be said that the plaint was defective when the evidence clearly shows that the notice under S. 80 was delivered to the proper person. The word "served" can be taken to mean "delivered". For the purpose of determination of the question whether there are defects in the plaint or not, it is sometimes necessary or rather evident before the Court exercises its power under R. 11 of O. 7 of the Code to go into evidence; when evidence is gone into, the Court is to consider the existence or otherwise of the defect in the light of the evidence. [Para 4]

(b) Civil P. C. (1908), S. 115—Failure to exercise and illegal exercise of jurisdiction—Suit for damages for non-delivery of goods consigned against two railways — Notices under S. 80 served on both — Omission of averment in plaint of delivery of notice to one defendant — Suit dismissed as a whole — Case not of joint liability — There was held to be not only failure to exercise but illegal exercise of jurisdiction — Civil P. C. (1908), S. 80.

Plaintiff brought a suit for recovery of damages for non-delivery of materials consigned for transmission over the East Indian and Bengal Nagpur Railways against the Governor-General of India (defendant 1) owner of the said E. I. R. Company and the B. N Railway Co., Ltd. (defendant 2) through their agent and General Manager. Notices against both the defendants under S. 80 were served in fact but the plaint stated in respect of notice to Governor-General that the plaintiff "served" a registered postal notice, instead of stating that the notice was "delivered". The lower appellate Court dismissed the whole suit on the ground that there was no strict compliance with the provisions of S. 80. The case was not proceeded with as a case of joint liability in which failure of the suit against one must necessarily mean failure of the suit against both, and therefore as a whole. The plaintiff's case in the trial Court was that either of the two Railway companies might be made liable for claim as the one would be presumed to be the agent of the other for the purpose of carriage:

*Held*, that the lower appellate Court in dismissing the suit as a whole had proceeded on a wrong notion of its jurisdiction as to the disposal of the suit. It assumed that it had no jurisdiction to pass any other order but to dismiss the suit as a whole. Therefore, in dismissing the suit as a whole, it had not only failed to exercise its jurisdiction which was vested in it by law but had acted illegally in the exercise of its jurisdiction. Its order, therefore, dismissing the suit as a whole must be set aside. The Court should have either expunged the name of the Governor-General from the category of the defendants, or should have called upon the plaintiff to remove the defect as the Court is empowered to do under the provisions of O. 7: *Case law referred.* [Para 7]

*Cases referred*:—

1. ('37) 24 A. I. R. 1937 Sind 291: 32 S. L. R. 67: 172 I. C. 722, Gangaram and Rupchand & Co., Firm v. Secy. of State.
2. ('36) 17 P. L. T. 152 · 23 A. I. R. 1936 Pat. 339 : 15 Pat. 353: 161 I.C. 690, Secy. of State v. Amarnath.
3. ('27) 54 I. A. 338 : 14 A. I. R. 1927 P. C. 176 : 51 Bom. 725 : 104 I. C. 257 (P. C.), Bhagchand Dagdusa v. Secretary of State.
4. ('35) 154 I. C. 103 : 22 A. I. R. 1935 Pat. 86, Tipan Prasad Singh v. Secretary of State.
5. ('31) 132 I. C. 634 : 58 Cal. 850 : 18 A. I. R. 1931 Cal. 503, Jagadish Chandra v Debendra Prasad.
6. ('85) 11 Cal 6 : 11 I A. 237 (P. C.), Amir Hasan Khan v. Sheobux Singh.

*S. C. Mazumdar* — for Petitioner.
*S. B. Bose and Nitai Chandra Ghosh* — for Opposite Party.

**Order.** — This is a plaintiff's application against an order of the District Judge of Purulia, dated 19-1-1946, dismissing the plaintiff's suit while confirming the decree of the trial Court. The suit was for recovery of damages for non-delivery of one bundle of bell-metal materials consigned for transmission over the East Indian and Bengal Nagpur Railways against the Governor-General of India (defendant 1) owner of the said E.I R. company and the B N. Railway Co., Ltd. (defendant 2) through their agent and General Manager. The suit was contested by both the defendants, and several issues were framed of which the one material for the purpose of this petition is : "2 Is the suit barred for want of compliance with the provisions of s 80, Civil P. C.?" The material portions of the plaint and the written statement from which the above issue arose need reproduction. The plaintiff stated in his plaint that he

"served a registered postal notice with an acknowledgment due upon the Secretary to the Governor-General in Council under S. 80. Civil P. C., on 4 5-1943."

Separate written statements were filed by the defendants. Defendant 2 raised no plea in bar

of the plaintiff's suit based upon S. 80 of the Code. Defendant 1 pleaded "that no notice under S. 80 was served upon him." It would be relevant to mention here that none of the defendants raised any objection to the defective character of the plaint which is the subject-matter of consideration in this revision. It has been found by the Court below that notice under S. 80 has, in fact, been served, and the learned District Judge in this connection observes:

"In fact, according to the record the notice was delivered but whether the notice was actually delivered or not is not the point."

The learned Munsif, in connection with the plaintiff's contention that the Deputy Director of the Railway Board to the Government of India had in his letter dated 28-5-1943 admitted receipt of the plaintiff's notice and as such, it was not open to defendant 1 to state anything to the contrary observed:

"I should, however, think that there can be no question of estoppel on points of law nor can it be held that the Deputy Director will by his conduct be deemed to have waived the legal requirement."

After so observing, he said:

"In the result I hold that there has been no strict compliance with the provisions of S. 80, Civil P.C., and the suit must fail on this ground."

Being aggrieved by the orders aforesaid, the plaintiff has approached this Court in revision.

[2] In my judgment, there appears to be some misapprehension in the minds of the Court below in relation to the scope of that portion of S. 80 of the Code which bears upon the question before us. Section 80 may be divided into two parts. The first part deals with the service of notice in writing, and the second part with a rule of procedure as to what should the plaint contain. The first part begins with the words: "No suit shall be instituted against the Crown" and ends with "stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims." In this part is provided what should the notice in writing contain, to whom it should be delivered or at whose office it should be left. This provision is prefixed with the mandatory words:— "No suit shall be instituted . . . until the expiration of two months next after notice in writing" etc. These words cannot be read as prefatory to the second part of the section which reads "and the plaint shall contain a statement that such notice has been so delivered or left." From the very language of the two parts, their respective significance will appear to be widely divergent. The one affects the plaintiff's right to sue, while the other relates to a matter of procedure. The second part may be classed with certain rules of procedure as to the contents of a plaint prescribed in O. 7 of Sch. 1 to the Code; for example, *see* R. 1 of the Order which reads: "The plaint shall contain the following particulars" etc. The other examples are furnished by Rr. 2, 3, 4, 5, 6, 7 and 8.

[3] Under the circumstances, I should hold that the defect in the contents of the plaint does not go to the root of the plaintiff's right to sue. In this case, as found by the learned Court below, the requisite notice in writing contemplated in the first part of S. 80 of the Code had been delivered to the right person, and the suit was instituted two months after the delivery of the notice. Therefore, the true perspective in which the question should be viewed is that the plaint was defective in the sense in which it is considered defective within the meaning of O. 7, R. 11, Civil P. C. In this view of the matter, I should hold that both the learned Courts below were wrong in dismissing the suit as they have done in this case. Considering that the plaint was defective, as the Courts below have held it to be, the order that they could pass would have been one under O. 7, R. 11.

[4] The next question to which I shall address myself is whether there is any defect in this plaint, or, in other words, whether the second part of S. 80 of the Code has not been complied with. I have already quoted the averment of the plaint by way of compliance with the provisions of the section. The section requires the plaint to contain a statement that such notice has been "so delivered or left." The present is not a case of leaving the notice at the office of the prescribed personnel under the section. It is a case in which the notice has, in fact, been delivered by post. The only question is whether the word "served" would lawfully and correctly replace the word "delivered." The learned lower appellate Court is of opinion, and I think rightly, that the word "served" would mean "delivered." I should quote the passage in which he says so. The passage reads:

"The learned Munsif has considered a ruling of the Sind Court reported in A. I. R. 1937 Sind 291[1] where the word 'sent' had been used and the learned lawyer for the appellant says that the word 'sent' and the word "served" are different. In my opinion it is so. If a notice is served on somebody it is '*delivered*,' It is not merely sent. If a letter is sent it does not mean to say that it has been delivered."

He, however, was of opinion that in the setting in which the word "served" was placed in the present plaint, it would be equivalent to "sent." In this connection he says:

"But the question is not the word 'served' by itself that one has to consider but what is the meaning of the sentence which I have just quoted from the plaint. The words that I have just quoted cannot mean sent through the post and the notice was delivered. The plaint says that the plaintiff served registered postal notice with acknowledgment due, that is to say, the plaintiff sent a registered letter through the post with acknowledgment due. If the plaintiff had fur-

ther gone on to say that to the Governor-General the letter was delivered the matter would have been clear."

In my view there is no room for doubt that the learned lower appellate Court was not entitled to read "sent" for the word "served." Particularly, in a technical matter like this, it should be borne in mind that rules of procedure are meant to advance the cause of justice but not to fetter it. In construing the word used in the plaint, the real context is the provisions of S. 80 of the Code. It is apparent that it was in fulfilment of the provisions of that section that the statement was made. Every lawyer understands that he has to show in the body of the plaint that the legal bar against institution of the suit as provided in first part of S. 80, has been removed in this particular case. When the section provides that the notice in writing should either have been delivered to the person named therein or left at his office it provides the specific mode of service as applicable to the case of notice prescribed under the section. Under the circumstances, without anything more, the word "served" in the present case should mean that the notice has either been delivered to or left in the office of the person authorised under the section. It has been argued with some amount of conviction by Mr. S. N. Bose appearing for the opposite party that the words "with acknowledgment due" are characteristic enough to point rather emphatically to the construction adopted by the learned Court below. I do not, however, consider this contention to be sound. The words "with acknowledgment due" are descriptive of the words "registered post" or "registered postal notice." To my mind, it appears that what the plaint meant was that the notice had been served through registered post and acknowledgment was obtained. For the purpose of determination of the question whether there are defects in the plaint or not, it is sometimes necessary or rather evident before the Court exercises its power under R. 11 of O. 7 of the Code to go into evidence; for example, the question whether the relief claimed is under-valued does not admit of ready solution without some evidence. When evidence is gone into, the Court is to consider the existence or otherwise of the defect in the light of the evidence. In this particular case when the Courts below expressed their opinion as to the meaning of the word "served," they had before them the admission of the defendant concerned, and besides, the proof of delivery of the notice by registered post and its due acknowledgment. Why should not the words in the plaint, therefore, be interpreted in the light of the evidence adduced? I should, therefore, hold that the plaint does not suffer from any defect which is sought to be assigned to it. On the contrary I am of opinion that the plaint does comply with the provisions of S 80, Civil P. C.

[5] Next, it is argued by Mr. Bose that however wrong the opinion of the Courts below might be, this Court should not interfere in its revisional jurisdiction. His submission is that the case does not fall within the purview of S. 115, Civil P. C. If this argument is acceded to, the result will be that injustice to the plaintiff will be perpetrated.

[6] Before applying my attention to this contention, it is necessary to examine what necessary consequences should befall the suit, in the event of non-compliance with the provisions of the second part of S. 80, Civil P. C., in the particular circumstances of the present case. It is a suit in which the Governor-General is not the sole defendant. The goods were to be carried partly by the East Indian Railway and partly by the Bengal Nagpur Railway, the destination of the consignment being one of the stations of the latter railway. The Governor-General was made defendant 1 as the owner of the East Indian Railway. As I have already pointed out, omission of the averment from the plaint would be more appropriately a ground for the rejection of the plaint than dismissal of the suit. Secondly, there are precedents of this Court showing the course to be adopted where the Crown or the Secretary of State or the Governor-General, as the case may be, is only one of several defendants. In 17 P. L. T. 152[2] the plaintiff had instituted a suit for recovery of rent of a holding impleading the Secretary of State as a *pro forma* defendant but no notice under S. 80, Civil P. C., was served upon him. The trial Court rejected the plaint but the lower appellate Court set aside that order, and remanded the case for disposal on the merits holding that as no relief was claimed against the Secretary of State, the notice under S. 80 was not essential. A Division Bench of this Court set aside the order of the lower appellate Court and directed expunction of the name of the Secretary of State from the action. In the well-known case in 54 I. A. 338[3] where the suit had been instituted before expiry of the prescribed period of notice under S. 80 of the Code, and the plaint had distinctly averred that notice as required under S. 80 had been given to the Collector, and it was also stated that as the suit was for injunction, the suit was being filed before the completion of the period of two months, Viscount Sumner at p. 358 of the report said as follows:

"The consequence is that the appellants' present position in regard to the taxes imposed upon them is as if their action had never been brought. It was unsustainable in limine. They commenced their suit before the law allowed them to sue, and can get no relief in it

either by declaration or otherwise. Whatever may be the case between other parties, as against the respondents (the Collector and the Secretary of State on whom no notice under S. 80 had at all been served) they must fail. They have taken their own course and have brought this result on themselves."

[7] In 154 I. C. 103[4] the plaint suffered from the defect of non-mention of service of notice on the Secretary of State. At a much later stage, the plaintiffs wanted to amend the plaint in order to state in express terms, as required by S. 80 of the Code, that notices had been served on the Secretary of State more than two months prior to the institution of the suit. The learned Subordinate Judge, relying upon a decision of the Calcutta High Court in 132 I. C. 634 corresponding to 58 Cal. 850,[5] held that the plaintiffs should not be allowed to state at that stage that the Secretary of State had already been served. Fazl Ali J. (as he then was) made a distinction between a case of non-service of notice under S. 80 and a case of non-averment of the fact of service, and held that 58 Cal. 850[5] does not warrant the view that the Court is not competent to allow the amendment if there is no averment in the plaint of the fact that notice under S. 80 has been served as required by that section on the Secretary of State, even though it may be proved as a fact that a notice required by S. 80 had been served in the manner provided by the section. In disposing of the civil revision, his Lordship held that as the lower Court Judge apparently proceeded in the matter on the assumption that he had no power to allow the amendment, he had failed to exercise a jurisdiction which was vested in him by law, and this brought the case well within the ambit of S. 115, Civil P. C. As I have already indicated that if the District Judge was satisfied, as he has been in this particular case, that the alleged defect was a real one, he should have either expunged the name of the Governor-General from the category of the defendants, or should have called upon the plaintiff to remove the defect as the Court is empowered to do under the provisions of O 7 of Sch. 1, Civil P. C., before rejecting the plaint, but he was never justified in dismissing the suit as a whole. While expressing this view, I am fully alive to the observations of their Lordships of the Privy Council in 54 I. A. 338[3] already referred, in relation to an argument distinguishing between the effects of non-service of the notice under S. 80 on the Secretary of State and service of notice upon the Collector. The observation was :

"Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government notification was bad as the foundation of everything done, but without the presence of the Secretary of State before the Court, the notification could not be assailed and if it stands as valid, the Collector's own action cannot be successfully impunged."

The facts of this case, however, present quite a different feature. It is a case of either joint or several liability as between the two defendants. In fact, in this case, relying upon S. 80. Railways Act, it was argued in the trial Court by the plaintiff's pleader that either of the two Railway companies may be made liable for the plaintiff's claim as the one would be presumed to be the agent of the other for the purpose of carriage. Whatever may be fate of this argument, it makes it clear that it was not being proceeded with as a case of joint liability in which failure of the suit against one must necessarily mean failure of the suit against both, and, therefore as a whole. I would, therefore, hold that the learned lower appellate Court in dismissing the suit as a whole has proceeded on a wrong notion of his jurisdiction as to the disposal of the suit. He assumed that he had no jurisdiction to pass any other order but to dismiss the suit as a whole. In this view, he did not proceed to consider the other issues involved in the suit. In my view, therefore, in dismissing the suit as a whole, he has not only failed to exercise his jurisdiction which was vested in him by law but has acted illegally in the exercise of his jurisdiction. His order, therefore, dismissing the suit as a whole must be set aside. In this view of the matter, the rulings relied upon by Mr. Bose of which the case in 11 Cal. 6[6] was the principal need not be considered as I do not hold in this case that the lower appellate Court, in deciding the point of law wrongly acted illegally or with material irregularity in exercise of his jurisdiction. But, on the contrary, I hold even on his own decision he acted illegally in exercising a jurisdiction to dismiss the suit which legally speaking he had not.

[8] After having set aside his order, I shall have to make such order in the case as I think fit according to S. 115, Civil P. C. The order that I make in this particular case is that the plaint does not suffer from any defect as to its contents *re*: an averment of delivery of notice on defendant 1, and the plaint, therefore, is in order. Under the circumstances, I should send the appeal to the learned lower appellate Court for disposal on merits. The petition is allowed with costs. Hearing fee one gold mohur.

S.C. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 167** *[C. N. 60.]*

DAS J.

*Darsan Pande — Appellant* v. *Ghaghu Pande and others—Respondents.*

Appeal No. 153 of 1946, Decided on 5th August 1947, from appellate decree of Third Addl. Sub-Judge, Arrah, D/- 10th December 1945.

Tort—Malicious prosecution — Essentials to be proved—Onus—Want of reasonable and probable cause—Malice—Proof as to.

In a suit for malicious prosecution, the plaintiff must prove that the prosecution was instituted against him without any reasonable and probable cause, and that it was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. Innocence *per se* does not raise the presumption as to want of reasonable and probable cause. Innocence coupled with other circumstances may raise a presumption as to want of reasonable and probable cause. The onus is undoubtedly on the plaintiff, but may be discharged by showing that the fact of innocence in a particular case involves with it other circumstances which show that there was the absence of reasonable and probable cause : 25 A. I. R. 1938 Pat. 529, *Expln.*; (1883) 11 Q. B. D. 440, *Ref.* [Paras 2, 3]

A mere absence of reasonable and probable cause does not justify, as a matter of law, the conclusion that the prosecution was malicious, though it is quite conceivable that the evidence which is sufficient to prove absence of reasonable and probable cause may also establish malice. The two questions are in most cases interwoven, and there may be circumstances which show that there was not merely the want of a reasonable and probable cause but also malice of the kind required in an action for malicious prosecution. The question, therefore, depends on the circumstances of each particular case. There may be malice, but no absence of reasonable and probable cause. Conversely, the absence of reasonable and probable cause is not *per se* evidence of malice, but the same circumstances in a particular case may show both that is, absence of a reasonable and probable cause and malice, the two questions being interwoven in most cases : 31 A. I. R. 1944 P. C. 1 ; 12 C. L. J. 410 and (1891) 2 Q. B. D. 718, *Rel. on.* [Paras 6 & 7]

*Cases referred* :—

**1.** ('38) 19 P. L. T. 889 : 25 A. I. R. 1938 Pat. 529 : 178 I. C. 619, Taharat Karim v. Abdul Khaliq.
**2.** (1883) 11 Q. B. D. 440 : 52 L. J. Q. B. 620 : 49 L. T. 618 : 32 W. R. 50, Abrath v. North Eastern Ry. Co.
**3.** ('26) 13 A. I. R. 1926 P. C. 46 : 1 Luck. 215 : 29 O. C. 163 : 95 I. C. 329 (P. C.), Balbhaddar Singh v. Budri Sah.
**4.** ('44) 31 A. I. R. 1944 P. C. 1 : I. L. R. (1944) Kar. P. C. 47 : 211 I. C. 141 (P. C.), Braja Sunder Deb v. Bamdeb Das.
**5.** ('10) 12 C. L. J. 410 : 6 I. C. 675, Shama Bibi v. Chairman of Baranagore Municipality.
**6.** (1891) 2 Q. B. 718 : 61 L. J. Q. B. 151 : 65 L. T. 108, Brown v. Hawkes.

*Kailash Rai* — for Appellant.
*A. B. N. Sinha* — for Respondents.

**Judgment.** — This second appeal arises out of an action for malicious prosecution. The defendant is the appellant before me. He had filed a complaint against the respondents alleging that they had committed offences under various sections of the Penal Code. The respondents were summoned to stand their trial and after a trial lasting for about a year they were acquitted by the criminal Court. The respondents then brought the present action for malicious prosecution. The Courts below have decreed the suit, the learned Munsif allowing Rs. 150 for the expenses incurred in the criminal litigation and Rs. 490 as damages for loss of prestige and physical and mental discomfort. The learned Subordinate Judge who heard the appeal has reduced the amount of damages. Learned counsel for the appellant has not very seriously raised before me the question of the amount of damages, and learned counsel for the respondents on whose behalf a cross-objection was filed regarding the amount of damages has not seriously pressed the cross-objection. Therefore, if the decision of the Courts below is right in other respects, it would be unnecessary to consider the question of the amount allowed as damages by the Court of Appeal below.

[2] There is no dispute in this case that a criminal proceeding was instituted against the respondents on the complaint of the appellant, nor is there any dispute that the said proceeding terminated in favour of the respondents. These two facts are not in doubt. It may, therefore, be taken as beyond dispute that the respondents have proved (1) that they were prosecuted by the appellant and (2) that the proceedings complained of terminated in favour of the respondents. The points which it is necessary for the plaintiff to substantiate in an action for malicious prosecution are no longer in doubt; they have been decided over and over again. It has been laid down in numerous decisions that besides the two points mentioned above the plaintiff must also prove that the prosecution was instituted against him without any reasonable and probable cause, and that it was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It is with regard to these two points that learned counsel for the appellant has seriously pressed his arguments before me. His contentions so far as I have understood them are threefold, firstly, he has contended that the Court of Appeal below was wrong in drawing a particular presumption as to the absence of a reasonable and probable cause from the innocence of the respondents as established by the acquittal in the criminal Court, on the basis of a decision of this Court in 19 P. L. T. 889[1]; secondly, he has contended that the Court of Appeal below has committed an error of record with regard to the evidence of one of the witnesses for the respondents (P. W. 2), and thirdly, he has contended that the Court of Appeal below has committed an error in law in inferring malice, the kind of malice which is required to sustain an action for malicious prosecution, from mere absence of a reasonable and probable cause, in other words, it is contended that the Court of Appeal below has really come to no finding on the question

of malice and it is suggested that this clearly vitiates the decision of the Court of Appeal below.

[3] I take up these contentions in the order in which I have mentioned them. Dealing with the point of the absence of a reasonable and probable cause the learned Subordinate Judge has expressed himself as follows :

"It has been argued before me by the pleader for the appellant that the plaintiffs have failed to prove that there was no reasonable and probable cause for the filing of the complaint and that it was done maliciously. He has argued that the onus of proving this lay upon the plaintiffs and they had failed to discharge this onus. There does not appear to be any dispute in this case about the fact that Darsan (appellant before me) had filed a complaint against the plaintiffs; that the plaintiffs were put on trial on account of that complaint and that they were ultimately acquitted. The learned Munsif relied upon a decision of our own High Court reported in 19 P. L. T. 889[1] and he found that as the facts alleged were within the personal knowledge of the defendant and the facts were found to be false, so there was a presumption not only that the plaintiffs were innocent but that there was also no reasonable and probable cause for the accusation."

The learned Subordinate Judge has then quoted an extract from the said decision and has pointed out that in the criminal case the allegation was that the offences had been committed in the presence of and against the person of the present appellant—facts which were within his personal knowledge and, therefore, the principle laid down in 19 P. L. T. 889[1] applied and there should be a presumption that the present appellant had no reasonable and probable cause for the accusation. Learned counsel for the appellant contends that this view is not correct, and that it has coloured the other decision of the learned Subordinate Judge to the effect that the respondents had satisfactorily proved that the present appellant had invented and instigated the whole story for the prosecution. Learned counsel has also challenged the correctness of the decision referred to above, and has suggested that if I entertain any doubt about the correctness of the said decision, the matter should at least be placed before a larger Bench. I have very carefully considered the argument which has been presented before me and in view of the manner in which it has been presented, I consider that there is need for expressing oneself very clearly in the matter. The question of the burden of proof in an action for malicious prosecution was gone into very thoroughly and carefully by the Court of Appeal in England in the leading case in (1883) 11 Q. B. D. 440.[2] It was pointed out there that it was not enough for the plaintiff to show, in order to support the claim which he had made, that he was innocent of the charge upon which he was tried; he had to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants. It was further observed that the burden of proving each one of the points mentioned above lay upon the plaintiff and, speaking generally, if the plaintiff merely proved that he was innocent and gave no evidence of the circumstances under which the prosecution was instituted, he was bound to fail. These observations were made with reference to the facts of that case where a medical man was prosecuted by the Railway Company on certain information having been given to the Directors of the Company which *prima facie* showed a conspiracy between the medical man and a person who got damages on account of injuries alleged to have been sustained in a railway collusion. One of the questions which was put to the jury in that case was if the defendants had taken reasonable care to inform themselves of the true state of the case. Cave J. (as he then was) in summing up to the jury, had told that it was for the plaintiff to prove that the Railway Company did not take reasonable care to inform themselves. The question was if this direction to the jury was erroneous in law. The Court of Appeal held that it was not, and that the burden of proving each of the three major points which arose in an action for malicious prosecution lay on the plaintiff and that if in order to show the absence of reasonable and probable cause there are minor questions which are necessary to determine, the burden of proving each of those minor questions lies on the plaintiff, just as much as the burden of proving the whole does. Bowen L. J. pointed out, however, that there might be special circumstances which along with the fact of innocence, established by the acquittal in criminal proceeding, might show that there was the want of reasonable and probable cause. I can do no better than quote the observations of Bowen L. J. while dealing with this matter :

"Something has been said about innocence being proof, *prima facie*, of want of reasonable and probable cause. I do not think it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which show that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and probable care. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause It must be innocence accompanied by such circumstances

as raise the presumption that there was a want of reasonable and probable cause."

I think that it is these observations which their Lordships had in mind when they said in 19 P. L. T. 889[1] that where the accusation against the plaintiff was in respect of an offence which the defendant claimed to have been committed and the trial ended in acquittal on the merits, the presumption would be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation. I may note here that their Lordships were dealing with a first appeal in that case, and after referring to the presumption they discussed the evidence and came to the conclusion that the accusation brought against the plaintiff was false and without any reasonable and probable cause. The observations of Bowen L. J. show very clearly that innocence *per se* does not raise the presumption as to want of reasonable and probable cause. Innocence coupled with other circumstances such as those mentioned by his Lordship may raise a presumption as to want of reasonable and probable cause. The decision in 19 P. L. T. 889[1] had these exceptional circumstances in view when laying down the principle that a presumption may arise in certain cases as to want of reasonable and probable cause from the innocence of the plaintiff. In my opinion, the decision in 19 P.L.T. 889[1] is correct, if I may say so with respect, and does not go against the general principle that the plaintiff must prove in an action for malicious prosecution that the prosecution was instituted against him without any reasonable and probable cause; the onus is undoubtedly on the plaintiff, but may be discharged by showing that the fact of innocence in a particular case involves with it other circumstances which show that there was the absence of reasonable and probable cause. This is exactly what has happened in the present case. The appellant alleged that he had been threatened etc. The allegations have been found to be false. The appellant must have known that the story which he was telling against the man whom he was prosecuting was false. It follows, therefore, that there was a want of reasonable and probable cause.

[4] There has been some controversy before me if the respondents must again establish in the civil Court their innocence of the criminal charges preferred against them. Whatever doubt there may have been regarding this point previously, the decision of their Lordships of the Judicial Committee in A. I. R. 1926 P. C. 46[3] has, I think, set the matter at rest. That was an appeal from the decision of the Judicial Commissioner of Oudh. The Judicial Commissioner had formulated four propositions which the plaintiff had to prove in an action for malicious prosecution. The second proposition so formulated was that he was innocent of the charge upon which he was tried. Their Lordships pointed out that this was a wrong view of the law, and they said that the second proposition should be

"that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating."

Their Lordships further observed that it was sufficient for the appellants before their Lordships (that is, the plaintiffs) to prove that the criminal proceedings had terminated in their favour, and that opened the way for the proof of the next proposition that the respondents (before their Lordships) had instigated the proceedings maliciously and without probable cause. I am of the view that the learned Additional Subordinate Judge had committed no error in law when he found that in the circumstances of the case before him there was a presumption that the complaint was filed without a reasonable and probable cause.

[5] The learned Subordinate Judge has not based his decision mainly on such a presumption. He has considered the evidence independently and irrespective of the presumption and on a consideration of that evidence he has come to the definite conclusion that the complaint was filed without any reasonable and probable cause and that the present appellant had invented and instigated the whole story for the prosecution. This finding of the learned Subordinate Judge is based on the evidence of three witnesses for the respondents and that of the appellant himself. It has been contended before me that the learned Subordinate Judge has committed an error of record with regard to the evidence of P. W. 2. My attention has been drawn to the statement in cross-examination of this witness to the effect that he had no knowledge of the facts of the criminal case. The learned Subordinate Judge has stated in his judgment that P. W. 2 had given evidence to the same effect as the other two witnesses. It has been argued before me that this statement of the learned Subordinate Judge is an error of record. I am unable to accept this contention. The statement made in cross-examination of the witness has to be read along with his statements in examination-in-chief. The witness had clearly stated in examination-in-chief that the criminal proceeding was false and no such occurrence had taken place as was alleged by the appellant. When no such event as alleged by the appellant had taken place, the witness was not wrong when he said that he had no knowledge of the facts of the criminal case. I do not think that the learned Subordinate Judge has committed any error of record with regard to the evidence of P. W. 2.

[6] This brings me to the last contention, namely, if the learned Subordinate Judge has committed an error in law as respects the finding of malice. It is contended that the learned Subordinate Judge has not found malice independent of the absence of a reasonable and probable cause. Learned counsel for the appellant has strongly relied on the following observations of their Lordships of the Judicial Committee in A. I. R. 1944 P. C. 1.[4] The observations will be found at p. 4 of the report .

"In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things (1) that the defendant was malicious and (ii) that he acted without reasonable and probable cause .Malice has been said to mean any wrong or indirect motive, but prosecution is not malicious merely because it is inspired by anger. However, wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of malicious prosecution. But malice alone is not enough, there must also be shown to be absence of reasonable and probable cause."

It is contended that the learned Subordinate Judge should have found malice independent and irrespective of his finding as to the absence of a reasonable and probable cause, and the learned Subordinate Judge is wrong in inferring malice merely from the absence of a reasonable and probable cause. This contention also appears to me to be without substance. The learned Subordinate Judge has pointed out that the respondents had taken the lease of a piece of land on 25th June 1942. The house of the present appellant fell within that land, and on the very next day the appellant made a false complaint without any reasonable and probable cause. As has been pointed out in 12 C. L. J. 410,[5] a mere absence of reasonable and probable cause does not justify, as a matter of law, the conclusion that the prosecution was malicious, though it is quite conceivable that the evidence which is sufficient to prove absence of reasonable and probable cause may also establish malice. As observed by their Lordships of the Judicial Committee in A. I. R 1944 P C. 1[4] the two questions are in most cases interwoven, and there may be circumstances which show that there was not merely the want of a reasonable and probable cause but also malice of the kind required in an action for malicious prosecution. The learned Subordinate Judge has found that the present appellant had invented and instigated the whole story for the prosecution and that his motive was an improper motive, namely, a wish to injure the respondents rather than to vindicate the law. This wish to injure the respondents arose out of the fact that they had taken settlement of a piece of land on which stood the house of the appellant.

[7] Dealing with the question of malice in (1891) 2 Q.B. 718[6] Cave J. (as he then was) had observed:

"Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive, and malice can be proved either by showing what the motive was and that it was wrong or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

Dealing further with the question if want of reasonable and probable cause may itself show malice his Lordship stated as follows :

"Of course, there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause, the jury may always find malice, no matter what the circumstances may be."

The question, therefore, depends on the circumstances of each particular case. It would be wrong to say as a general proposition that malice would be inferred from the absence of a reasonable and probable cause. As observed by their Lordships of the Judicial Committee in A. I. R. 1944 P. C. 1[4] there may be malice, but no absence of reasonable and probable cause. Conversely, the absence of reasonable and probable cause is not per se evidence of malice, but the same circumstances in a particular case may show both that is, absence of a reasonable and probable cause and malice, the two questions being interwoven in most cases.

[8] The contentions raised on behalf of the appellant having failed, the appeal is without substance and must be dismissed with costs, and I order accordingly. The cross-objection is also dismissed.

S. C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 171** *[C. N. 61.]*

SINHA AND MUKHARJI JJ.

*Lachhmi Prasad—Petitioner* v. *Gobardhan Das and others—Opposite Party.*

Civil Revn Nos. 727 and 909 of 1946, Decided on 26-8-1947, from order of Addl. Sub-Judge, Motihari, D/- 5-8-1946.

**(a) Arbitration Act (1940), S. 33—Filing of award is necessary.**

Until the award is filed, no application to set it aside can be entertained : 31 A. I. R. 1944 Cal. 304 and 29 A. I. R. 1942 Bom. 101, *Ref.* [Para 4]

**(b) Limitation Act (1908), Art. 178 — Starting point for computation of period.**

The period of 90 days referred to in Article 178 is to be computed from the date when one of the parties or both file an application in Court under S. 14, Arbitration Act. It has no reference to the time when the arbitrators or umpire are requested to file the award. [Para 4]

**Annotation :—** ('42-Com.) Lim. Act, Art. 178, N. 4.

**(c) Arbitration Act (1940), S. 17 — One party *G* applying to declare award invalid before filing of award — Arbitrators served and award and record**

called for by Court and filed — Arbitrators filing affidavits in support—Application withdrawn by *G* —Other party applying for passing decree on award —Award held validly before Court and such relief could be granted.

A certain award was made on 29-1-1946 and on 31st January the parties to arbitration proceedings were served with notice under S. 14 (1) regarding the making and signing of award. On 13th February, *G* a party to the proceedings filed a petition in Court purporting to be under S. 33, praying that the award was invalid and inoperative. It was also prayed that the entire records of the arbitration proceedings be called for from the arbitrators. On this application a miscellaneous case was started and the other party *P* and the arbitrators were served with notices and appeared. The arbitrators filed affidavits in support of the award. The records were called for and were received by the Court. On 3-8-1946, *G* applied for withdrawing his application and the prayer was allowed. *P* thereupon requested the Court to make the award a rule of the Court and pass a decree thereon under S. 17. The question was whether the award was validly before the Court and *P* entitled to the relief claimed :

*Held*, that the application of *G* could very well be treated as an application under S. 14 of the Act requesting the Court to call for the award. This application was well within time. Since the award was forwarded to the Court by the arbitrators who were a party to the miscellaneous case and they had filed affidavits, it could not be said that the award was not filed in Court. No doubt the arbitrators did not hand over the award to an officer of the Court and that no formal application was made by the arbitrators to the Court regarding the award. The filing of an award by an arbitrator is a mere ministerial act and no solemnity attaches to such an act. In the peculiar circumstances of the case there was no scope for the arbitrators to file the award supported by an application. The award was, therefore, validly before the Court. No doubt the miscellaneous case of *G* ended with the withdrawal of his application but since the award was validly before the Court the prayer of *P* that it might be made a rule of the Court could still be considered by the Court. [Paras 4, 5, 6]

*Cases referred*:—

1. ('43) I. L. R. (1943) 2 Cal. 392 : 31 A. I. R. 1944 Cal 304 : 218 I. C. 182, Bengal Jute Mills Co., Ltd. v. Jewraj Hiralal.
2. ('42) 29 A. I. R. 1942 Bom. 101 : I. L. R. (1942) Bom. 452 : 200 I. C. 32, Ratanji Veerpal & Co. v. Dhirajlal Manilal.
3. ('45) 32 A.I.R. 1945 Bom. 417 : I.L.R. (1946) Bom. 113, Jayantilal Jamnadas v. Chhaganlal Nathoobhai.

*L. K. Jha, S. N. Banarji, B. C. De and R. K. Bagchi*—for Petitioner.

*Sarjoo Prasad, K. Deyal and Nandlall* — for Opposite Party.

**Mukharji J.**—These are two connected civil revisions. They arise in the following way. On 13-2-1936 Gobardhan Das opposite party No. 1, filed an application in the Court of the Subordinate Judge of Motihari praying that a certain award made on 29-1-1946 was invalid and inoperative. The application purported to have been made under S. 33, Arbitration Act (Act 10 [X] of 1940). Under the order of the Additional Subordinate Judge a miscellaneous case No. 9 of 1946 was started and the number of the opposite party including the three arbitrators were ordered to be served with notice. Notice was served and the opposite party appeared. The arbitrators filed an affidavit in support of the award. On 3-8-1946 the applicant (opposite party No. 1 before this Court) put in a petition to the effect that he wanted to withdraw his application. On 5-8-1946 the Court allowed the prayer. The present petitioner requested the Court to make the award a rule of the Court and pass a decree thereon under S. 17, Arbitration Act; but this prayer was refused. The learned Additional Subordinate Judge passed his order finally in the miscellaneous case on 5-8-1946. The opposite party No. 1, Gobardhan Das, filed a title suit on 7-8-1946, in the same Court. The award above referred to related to certain partnership business between the parties. One of the reliefs prayed for in the title suit (No. 127 of 1946) is that the Court should declare that the partnership business was dissolved on a certain date. There was also a prayer that the defendants of the suit might be directed to render accounts from the beginning of the partnership business till the date of its dissolution. There was also an alternative prayer that if the Court should come to the conclusion that there was no legal and effective dissolution of the partnership business, a preliminary decree for dissolution of partnership and for rendition of accounts might be passed. The plaintiff of the suit requested the Court that a Commissioner might be appointed for taking accounts.

[2] One of the applications in revision (Civil Revision No. 909 of 1946) is for stay of proceedings in the title suit mentioned above. The other civil revision (No. 727 of 1946) is directed against the order of the Subordinate Judge passed on 5th August 1946, refusing the prayer of the present petitioner to make the award a rule of the Court.

[3] I shall deal with Civil Revision No. 727 of 1946 first. The reasoning of the learned Additional Subordinate Judge in this case for refusing the prayer of the petitioner to proceed under S. 17, Arbitration Act, is that the award in question was not filed in Court under S. 14 of the Act. The following few lines from the order of the learned Additional Subordinate Judge may be usefully quoted here :

"In other words, the Court need not pronounce its judgment unless and until the award is filed under S. 14 of the Act. Admittedly here the award has not been filed under S. 14 of the Act. Therefore the opposite party's prayer to the Court for giving its judgment over it seems to be illegal and improper."

The learned Additional Subordinate Judge then went on to consider the provisions of Art. 178, Limitation Act, as they stand after their amendment consequent upon the enactment of Act 10

[x] of 1940. The learned lower Court refers to the period of limitation mentioned in the amended Article and observes that this period is to be computed from 31st January 1946 when the parties to the arbitration proceedings were served with notice regarding the making and signing of the award. It is further observed by learned lower Court that as the present petitioner did not call upon the arbitrators to file the award in the Court within the period of limitation, he was out of Court. Towards the end of the order complained of the learned lower Court has made the following remarks:

"In fact the award by the punches was not filed in this case within 90 days from 31st January 1946. . . . In the present case it was filed on 4th May 1946 for evidentiary purpose. The opposite party, therefore, cannot make up his laches by coming at this stage with the protest petition to the applicant's prayer for withdrawal of the miscellaneous petition. It is up to the applicant to pursue or to withdraw it or to allow it to be dismissed for default. All that the opposite party can rightfully claim is the compensation for his unnecessary harassment."

Thereafter the learned Additional Subordinate Judge allowed the applicant before him to withdraw his miscellaneous petition.

[4] It has been contended on behalf of the petitioner that the view taken by the learned Additional Subordinate Judge in this case is wrong. Before I proceed further, I may at once say that the application of opposite party 1 under S. 33, Arbitration Act, was not tenable. It has been held in many cases that until the award is filed, no application to set it aside can be entertained. I may in particular refer to the case in I. L. R. (1943) 2 Cal. 392[1] and A. I. R. 1942 Bom. 101.[2] If, therefore, the applicant before the learned Additional Subordinate Judge did not want to proceed with his case, one can very well understand the reason. The real question for consideration, however, is whether the learned lower Court was right in his refusal to pass a decree on the award after the applicant before him had withdrawn his objection. On behalf of the opposite party in this Court it has been strenuously argued that as the award had not been filed in accordance with the provisions of S. 14, Arbitration Act, the prayer of the petitioner to make it a rule of the Court could not be entertained. In an earlier portion of the judgment I have given the relevant dates. It is common ground between the parties that the notice as contemplated by S. 14 (1), Arbitration Act, regarding the making and signing of the award was served on 31st January 1946. Article 178, Limitation Act, to which the learned lower Court has referred in his order under revision lays down that an application for the filing in Court of an award based under the Arbitration Act has to be made within 90 days of the date of service of the notice of the making of the award. Under S. 14, Arbitration Act, a party may request the arbitrators or the umpire to file the award in Court and in this way the award may be filed in Court. In the same section the arbitrators or the umpire may also file the award in Court on being directed by the Court to do so. The Court of course cannot *suo motu* issue an order that a particular award should be filed in Court. The implication is that one of the parties to the arbitration proceedings or both of them can move the Court by an application and the Court thereupon should direct the arbitrators or the umpire to file the award. The period of 90 days referred to in Art. 178, Limitation Act, is to be computed from the date when one of the parties or both file an application in Court under S. 14, Arbitration Act. It has no reference to the time when the arbitrators or umpire are requested to file the award. The learned advocate for the opposite party has argued that in the present case neither the arbitrators were asked by the parties to file the award nor was there any application in the Court within the statutory period of limitation for the filing of the award in Court. On behalf of the petitioner it was submitted that as the entire record together with the award was called for by the Court on the application presented within 90 days of the date of service of notice and the same was received by the Court in due course, there was no irregularity or illegality whatsoever. In reply to this the argument that has been advanced is that there was really no application for the filing of the award and that the award was not filed in Court in the proper sense of the term. This makes it incumbent on me to refer to the original application of the opposite party 1 which gave rise to Miscellaneous Case No. 9 of 1946. Admittedly this application was made within 90 days of the service of notice under S. 14 (1), Arbitration Act. The concluding portion of the petition is as follows:

"For the reasons set forth above, it is prayed that the application may be admitted, the entire records of the arbitration proceedings, including the objections of the petitioners, the account books etc., be called for from Babu Brijesh Lal Shikaria or other arbitrators and after finally hearing the award be set aside or such other further order or orders as may appear fit and proper may be passed."

One may very well ask how the Court could set aside the award unless the award was before it? Therefore the Court had to call for it from the arbitrators. In fact there is a distinct prayer that the entire records of the arbitration proceedings be called for from the arbitrators. The records were called for and they were received by the Court. The application of opposite party 1 can very well be treated as an application

under S. 14, Arbitration Act, requesting the Court to call for the award. As already stated, this application was well within time.

[5] Mr. Sarjoo Prasad for the opposite party contended that mere receipt of the records of the arbitration proceedings by the Court was something quite different from the filing of the award in Court. According to him filing of an award can only be made by an application. In the present case the award was forwarded to Court by the arbitrators who were a party to the miscellaneous case. The arbitrators also filed an affidavit in support of the award. In such circumstances I do not see how it can be said that the award was not filed in Court. It is true the arbitrators did not hand over the award to an officer of the Court. It is also true that no formal application was made by the arbitrators to the Court regarding the award. It has been held that the filing of an award by an arbitrator is a mere ministerial act. No solemnity attaches to such an act. This is the view taken in A. I. R. 1945 Bom. 417.[3] An act of an arbitrator when he files an award in Court is an act which the statute requires him to perform. He can intimate to the Court by his letter of request that he has made an award and that it should be taken on file. In the peculiar circumstances of the present case there was no scope for the arbitrators to file the award supported by an application. The learned Additional Subordinate Judge as requested by the applicant before him directed the arbitrators to forward the entire record of the arbitration proceedings including the award and the arbitrators simply obeyed this order of the Court. When they appeared in Court the arbitrators filed an affidavit in support of the award. In my opinion, the award was validly on the record.

[6] Now with regard to the prayer of the petitioner that a decree should be passed on the award. It is said that after the prayer for withdrawal made by the opposite party 1 was allowed, there was an end of the case. The miscellaneous case no doubt ended, but the award was before the Court and as I have already pointed out it was validly before the Court. The prayer that it might be made a rule of the Court could still be considered by the learned lower Court. A separate miscellaneous case might have been started for the purpose. Under Art. 158, Limitation Act, a party has to file his application for setting aside an award or for getting an award remitted for reconsideration within 30 days of the date of service of the notice of filing of the award. This provision of the Limitation Act clearly does not apply to the present case as the petitioner did not want to set aside the award or to get the award remitted for reconsideration. His prayer was that the award may be accepted as valid and that the Court might proceed accordingly.

[7] For the reasons stated above, I am inclined to the view that the learned lower Court wrongly refused to consider the prayer of the petitioner that the award might be accepted as valid. One more question that arises for consideration in this connection is whether the Court should at once proceed to confirm the award as opposite party 1 has withdrawn his objection. The opposite party has not withdrawn his objection in the sense that he accepts the award. He prayed for permission to withdraw the case as it was later on found out by him that his application under S. 33, Arbitration Act, was not maintainable in the absence of the award in Court at the time when the application under S. 33 was filed. Section 17, Arbitration Act, enacts as follows:

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall after the time for making an application to set aside the award has expired or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of or not otherwise in accordance with, the award."

Both the parties were before the Court when the award was received from the arbitrators. More than 30 days have already passed from the date when the award was received in Court. More than 30 days have also passed from the date when the affidavit in support of the award was filed. If for these reasons it is held that the opposite party must submit to the award the *bona fides* of which the opposite party was streneously challenging in its application before the learned Additional Subordinate Judge, then the result may be a complete failure of justice. In terms of Art. 158, Limitation Act, a party has a right of notice that an award has been filed in Court before Art. 158, Limitation Act, can be used against him. It is accordingly directed that the learned Additional Subordinate Judge should start a new miscellaneous case on the basis of the petition filed by the present petitioner requesting the learned lower Court to pass judgment on the award. He is further directed to issue notice to the opposite party regarding the filing of the award in Court inviting its objection to the award, if any. Thereafter the learned Additional Subordinate Judge should proceed according to the relevant provisions of the Arbitration Act.

[8] Above I have dealt with Civil Revision No. 727 of 1946. In view of the order passed therein, the hearing of the connected title suit

must be stayed and it is accordingly stayed. In the special circumstances of the case, the parties will bear their own costs.

**Sinha J.**—I agree.

S.C. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 175** *[C. N. 62.]*

DAS J.

*Mohar Raut — Petitioner* v. *Sheolochan Singh and others—Opposite Party.*

Civil Revn. No. 574 of 1946, Decided on 31-7-1947, against order of Sub-Judge, Chapra, D/- 13-2 1946.

**Civil P. C. (1908), O. 33, R. 1 — Sufficient means —Mere finding that joint family of which minor petitioner is member is possessed of some property and dealt in cattle does not by itself prove sufficient means.**

**The mere fact that the joint family of which the petitioner for leave to sue in forma pauperis is a member owns some property and deals in cattle does not by itself show that the petitioner is possessed of sufficient means to pay the court-fees. The possession that is spoken of in the explanation to R. 1 of O. 33, is not possession of property but of sufficient means and what the Court is concerned to enquire into is not actual possession of property, but capacity to raise the money necessary to pay the court-fee: 34 A. I. R. 1947 Pat. 34, *Ref.*** [Para 2]

**It cannot be said in every case where a minor member of a Hindu joint family sues to set aside an alienation of joint family property by his father, that he must be *ipso facto* entitled to sue as pauper. In a Mitakshara Hindu family no cosharer can predicate a share until there is a partition. There must be finding as what is the value of the property which the joint family has; that the joint family has any property other than those which are the subject-matter of the alienation regarding which the petitioner wishes to sue in forma pauperis. In the absence of such finding it cannot be said that the minor was posses-ed of sufficient means to pay court-fees: 12 A. I. R. 1925 All. 547, *Ref.*** [Para 2]

**Annotation. — ('44-Com.) Civil P. C., O. 33, R. 1, Note 3.**

*Cases referred* :—

**1.** ('46) 25 Pat. 318 : 34 A. I. R. 1947 Pat. 34 : 229 I. C. 17, Dhananjai v. Rajkeshwar.

**2.** ('25) 12 A. I. R. 1925 All. 547 : 47 All. 872 : 88 I. C. 420, Ram Prasad Singh v. Jagtamba Prasad Singh.

*Hareshwar Prasad Sinha and P. Jha* — for Petitioner.

*A. C. Sinha*—for Opposite Party.

**Order.** — This is an application on behalf of the plaintiff, who is a minor, against an order of the learned Subordinate Judge of Chapra, dated 18th February 1946, by which order the learned Subordinate Judge has rejected an application of the petitioner to sue in forma pauperis. The petitioner is a minor represented by his mother. The petitioner filed an application to sue in forma pauperis for the purpose of setting aside certain alienations stated to have been made by his father.

[2] The learned Subordinate Judge has expressed his finding as follows :

"It appears that the joint family of which the applicant is a member deals in buffalos and cows both at Chapra and Calcutta. The applicant is Ahir by caste. This is also a circumstance that supports the version of the opposite party. Besides the khatian shows that the joint family owns landed property. Thus taking all these facts and circumstances, I am of opinion that the applicant is in a position to pay court-fees."

It is contended before me that the learned Subordinate Judge has misdirected himself and acted with material irregularity in failing to investigate the real point which arose for decision. The mere fact that the joint family of which the petitioner was a member owned some property and dealt in cattle did not by itself show that the petitioner was possessed of sufficient means to pay the court-fees. As has been observed in a recent decision of this Court in 25 Pat. 318[1] the possession that is spoken of in the explanation to R. 1 of O. 33, Civil P. C., is not possession of property but of sufficient means and what the Court is concerned to enquire into is not actual possession of property, but capacity to raise the money necessary to pay the court-fee. There are many other decisions to the same effect, and it is not necessary to refer to all the decisions which have been cited before me. The learned Subordinate Judge did not find that the petitioner was possessed of sufficient means to pay the court-fees; he has merely found that the joint family of which the petitioner was a junior member had landed property and dealt in cattle. With regard to the question of dealing in cattle there is no finding that the joint family did possess any cattle from which money could be raised. It is well settled that in a Mitakshara Hindu family no cosharer can predicate a share until there is a partition. The learned Subordinate Judge has not found what is the value of the property which the joint family has; nor has he found that the joint family had any property other than those which are the subject matter of the alienations regarding which the petitioner wishes to sue in forma pauperis. My attention has been drawn to a decision of the Allahabad High Court in A. I. R. 1925 ALL. 547[2] where it has been held that in cases where a minor member of a Hindu joint family sues to set aside an alienation of joint family property by his father and where there is a share which has not been transferred, the minor cannot sue as a pauper unless an attempt has been made and it has actually been found impossible for the minor to obtain funds. It has been pointed out in that case that if the argument that a minor member has no definite share in joint family property is accepted as a good ground for permitting him to sue in forma pauperis, then every minor member of a joint family, except in the rare case of his possessing separate property, must be *ipso facto*

entitled to sue as pauper. I am not prepared to go so far as to say that in every case a minor member of a joint family must be *ipso facto* entitled to sue as pauper. In the case before me there is no finding as to what property the joint family possesses; nor is there any finding that the joint family has any property other than those which were the subject of alienation made by the father and which the petitioner was challenging. In the absence of such findings it cannot be said that the minor was possessed of sufficient means to pay court-fees. On the mere findings that the joint family has some property and that it dealt in cattle it cannot be said that the minor had sufficient means to pay the court-fees. There is an unreported decision of this Court in Civil Revision No. 200 of 1946, disposed of on 9th January 1947, where in similar circumstances it was held that the minor was entitled to sue in forma pauperis.

[3] In the result, I would allow the application and set aside the order of the learned Subordinate Judge. The learned Subordinate Judge is now directed to allow the petitioner to sue in forma pauperis. There will be no order for costs in this Court.

R.G.D. *Application allowed.*

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**A. I. R. (35) 1948 Patna 176** *[C. N. 63.]*

SINHA AND MUKHARJI JJ.

*Harbans Pandey and others — Plaintiffs —Appellants* v. *Sobhan Singh—Defendant — Respondent.*

Appeal No. 581 of 1945, Decided on 4-8-1947, from appellate decree of Sub-Judge, 2nd Court, Gaya, D/- 8-2-1945.

**(a) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 [IX] of 1938), Ss. 6 (2), 22 and 2 (d) — Decision on question whether landlord is petty landlord — Decision of revenue authority, if final.**

**In restoration proceedings it is Revenue Courts that have to decide for the purposes of S. 6 (2) for themselves and finally as to whether the landlords are "petty landlords" within the meaning of the Act and whether they are in direct cultivating possession of the holding in question. These are questions of fact which have to be enquired into and determined by those Courts. The determination of those questions, right or wrong, is expressly made final by the provisions of S. 22 of the Act. Hence, even assuming that the landlords are petty landlords, and that the Revenue Courts wrongly decide that question against them, it is no more open to the civil Courts to reopen that decision. The argument that the question whether the landlords are petty landlords raises a question of status, and the decision on the question of status can, therefore, be reopened, loses sight of the fact that the landlords have to prove not only that they are petty landlords within the meaning of the Act but also that they are in direct cultivating possession of the holding. These questions have to be determined on the evidence before the Revenue Courts, and, even if those Courts go wrong on merits they have the exclusive jurisdiction to decide those questions. The provisions of the Act leave no scope to the civil Courts to reopen the controversy and to arrive at an independent decision of their own. [Para 6]**

**(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 112B — Decision of collector on appeal in rent reduction proceedings—Finality.**

**The orders of the Collector on appeal under S. 112B are final and cannot be set aside by higher authorities Revenue or otherwise, except where they can be shown to have been passed without jurisdiction. Where the Rent Reduction Officer had decided that the tenant could claim reduction of rent under the provisions of cl. (d) of S. 112A (1) but on appeal the Collector had decided that the tenant could not invoke the aid of that clause, it cannot be said that the Collector in so deciding exercised a jurisdiction not vested in him or refused to exercise a jurisdiction vested in him, though he may have been in error in applying the provisions of the Bakasht Restoration Act or of the Bihar Tenancy Act, when it is not the case of the parties that the Collector had no jurisdiction to entertain the appeal: 32 A. I. R. 1945 Pat. 179, *Foll.*; 1943 P. W. N. 253, *Ref.* [Para 7]**

*Cases referred :—*

1. ('43) 1943 P. W. N. 253, Radha Krishnaji v. Ramkhelawan Singh.
2. ('43) 24 Pat. 234 : 32 A. I. R. 1945 Pat. 179 : 221 I. C. 223, Radhakrishnaji v. Ramkhelawan.

*Baldeva Sahay and K. N. Varma*—for Appellants.
*Ganesh Sharma and Lakshmi Narain Sinha* —for Respondent.

**Sinha J.**—This is a plaintiffs' second appeal from the decision of the learned Subordinate Judge of Gaya modifying that of the Munsif of Aurangabad in a suit for two declarations; (1) that the restoration of the holding under the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, was illegal, *ultra vires* and without jurisdiction, and (2) that a reduction of the rent of the holding after restoration was similarly *ultra vires* and null and void.

[2] The facts leading up to this appeal may shortly be stated as follows. The defendant, Sobhan Singh, had an occupancy holding which originally paid rent in kind. As a result of commutation proceedings, it was converted into a cash-paying holding in 1921 with effect from 1328 Fasli. The landlords obtained judgment against the tenant for arrears of rent, and, in execution of that decree, put the holding to sale, and purchased it themselves on 26-10-1933. On 2-7-1934, they obtained delivery of possession through Court. On the enactment of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 [IX] of 1938), the tenant started proceedings for restoration of his holding. The landlords, who are the plaintiffs in this suit, contested the tenant's right to restoration, chiefly on the grounds that they were petty landlords within the meaning of the Act, and that they had been in direct possession of the holding by cultivating the same. But the Revenue Officer decided against the landlords,

and, by his order dated 26-11-1939, he directed that the holding be restored to the tenant. The landlords went up in appeal or revision up to the highest revenue Court; but their contentions were negatived by those Courts, with the result that the tenant was put in possession of the holding in December 1939. Subsequently, the tenant made another application for reduction of rent, and the rent of the holding was reduced by the Rent Reduction Officer on 23-9-1940. The landlords preferred an appeal to the Collector, who has been vested with final powers in such proceedings under the Act. The Collector, by his orders dated 27-8-1941, allowed the appeal, and the effective portion of his judgment is as follows:

"I think it was not open to the learned R. R. O. to apply cl. (d) to this case. It is not the action (option?) of the tenant or the R. R. O., to apply any of the clauses. Clause (d) is inapplicable in this case, and cl. (b) is applicable. But the petition is time barred for being filed under cl. (b). I fully see that the tenant could not have applied within the time limit for obvious reasons; but to circumvent that circumstance, however unfortunate it might be, it is not possible to apply cl. (d). Appeal allowed. Cancel Rent Schedule."

The tenant's application in revision to the Commissioner being unsuccessful, he moved the Board of Revenue, and the latter, by its order dated 26-8-1942, allowed the revisional application set aside the appellate order of the Collector and restored the original order of the Rent Reduction Officer. Hence this suit by the landlords to get rid of the effect of the orders passed by the revenue Courts as aforesaid, restoring the holding and reducing its rent.

[3] The suit was contested by the tenant defendant who pleaded that the orders passed by the revenue Courts were quite regular and with jurisdiction, and that the civil Courts had no jurisdiction to interfere with the final orders passed by the revenue Courts.

[4] The two principal questions in controversy between the parties are: (1) whether the orders of the revenue Courts restoring the holding to the tenant were *ultra vires*, illegal and without jurisdiction, and (2) whether the order of the Board of Revenue restoring the Rent Reduction Officer's order, which had been set aside in appeal by the Collector, who had been vested with final powers by the Act, could be re opened in this suit on the ground that the Board of Revenue had no jurisdiction to interfere with the final orders of the appellate Court.

[5] The grounds urged in support of the contention that the orders of the revenue Court restoring the land to the defendant were *ultra vires* are: (1) that the Bihar Bakasht Restoration Act of 1938 is itself *ultra vires* of the Provincial Legislature, inasmuch as it was repugnant to certain provisions of an Act of the Central Legislature; (2) that the plaintiffs being petty landlords, and the lands in question being in their *khas* cultivating possession, the revenue Court had no jurisdiction to apply the provisions of the Bakasht Restoration Act, in favour of the tenant; and (3) that one of the cosharer proprietors, Jadunandan Pandey, had not been effectively impleaded in the proceedings. The first and the third grounds have not been pressed by the learned counsel for the appellants in this Court; the only ground pressed by him is the second one. This ground is based on cl. (a) of S. 6 (1), Bakasht Restoration Act. That clause is in these terms:

"that he is a petty landlord and that he has been cultivating the holding or any portion thereof by himself with his own stock or by his own servants since before the twenty-second day of March 1938."

In this connection it is necessary to set out certain relevant provisions of the Act. Clause (d) of S. 2 of the Act defines 'petty landlord" as meaning

"a landlord who has neither been assessed to agricultural income-tax under the provisions of any law for the time being in force relating to agricultural income-tax, nor is liable to pay local cess under the Cess Act, 1880, of an amount exceeding Rs. 375 per annum."

Section 3 gives a raiyat, whose holding or a portion of whose holding was sold at any time between the 1st day of January 1929, and the 31st day of December 1937, in execution of a decree for arrears of rent and was purchased by the landlord of such holding and is in the possession or under the control of the said landlord, the right to make an application to the Collector for the restoration of such holding or portion, and prescribes the form in which the application has to be made. Section 4 vests the Collector with the power to reject such an application on certain grounds stated therein. But, if the Collector decides to entertain the application made under S. 3 a notice has to be given to the landlords concerned as named in the application. Section 6 (1) recites the grounds on which such an application may be opposed. Section 6 (2) then provides that the Collector shall make such enquiry as he thinks fit and (omitting the unnecessary portions of the sub-section), if he decides that the landlord is a petty landlord, and that he has been cultivating such holding or portion as mentioned in cl (a) of sub-s ( ), he shall dismiss the application. Section 8 provides that, if the application is not dismissed by the Collector as aforesaid, the Collector shall determine the land which is liable to be restored to the raiyat under the provisions of the Act and the amount which shall be payable by the raiyat in order to obtain restoration of his holding, and then lays down the rules for the computation of the amount of

compensation. Section 12 provides that, on restoration of the land to the raiyat in pursuance of the provisions of the Act as aforesaid, any encumbrances created by the landlord on the lands thus restored to the raiyat shall not be binding upon him, and

"all such rights as the raiyat had in respect of the said land and the incidents thereof before its sale shall revive."

Section 22 makes the order and decision of the revenue Courts final in these terms :

"Every order passed by the Collector under this Act shall be final, and no civil Court shall entertain any suit or application to vary or set aside any decision or order given or passed under this Act."

[6] I have gone into the details of the provisions of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, in order to point out that the Act was intended to be self-contained as regards the procedure and the machinery to grant the relief to tenants of the class defined in the Act. The revenue Courts were vested with exclusive jurisdiction to entertain cases under the Act, and decide them, and the jurisdiction of the Courts was expressly barred in respect of the orders and decisions of those Courts. It was the revenue Courts which had to apply the provisions of the Act to the facts and circumstances of each individual case. With reference to the facts of the present case, it must be observed that the revenue Courts had to determine for themselves and finally as to whether the landlords were "petty landlords" within the meaning of the Act, and whether they were in direct cultivating possession of the holding in question. Those are questions of fact which had to be enquired into and determined by those Courts. The determination of those questions, right or wrong, was expressly made final by the provisions of S. 22 of the Act. Hence, even assuming that the plaintiffs were petty landlords, and that the revenue Courts wrongly decided that question against them, in my opinion, it is no more open to the civil Courts to re-open that decision. But Mr. Baldeva Sahay argued that the question whether the landlords in this case were petty landlords raised a question of status, and the decision on the question of status could be reopened. But this argument loses sight of the fact that the landlords had to prove not only that they were petty landlords within the meaning of the Act but also that they were in direct cultivating possession of the holding. These questions had to be determined on the evidence before the revenue Courts, and, even if those Courts went wrong on merits, they had the exclusive jurisdiction to decide those questions. It must, therefore, be held that there is no substance in the contention that the provisions of the Act leave any scope to the civil Courts to reopen the controversy and to arrive at an independent decision of their own. In view of these considerations, the first ground of attack against the judgment of the Courts below must be held to be without any substance.

[7] Coming to the second ground of attack against the judgment of the lower appellate Court, it has to be stated that the trial Court decided in favour of the appellants to the effect that the orders of the Board of Revenue, upholding the order of the Rent Reduction Officer reducing the rent by 40 per cent. were entirely illegal and *ultra vires*. On appeal, the learned Subordinate Judge reversed that part of the judgment, and held that the orders of the Board of Revenue were with jurisdiction, and that the orders of the Collector, setting aside the orders of the Court of first instance reducing the rent, were without jurisdiction. The learned Munsif relied upon the decision of a single Judge of this Court in 1943 P. W. N. 253.[1] In that case, it was laid down that, where under S. 112B, Bihar Tenancy Act, it is provided that the decision of the Collector of the district or of any officer so empowered, or of the prescribed authority, on any such appeal shall be final, there is no power in the Commissioner or the Board of Revenue to set aside the order of the Collector made rightly or wrongly in the exercise of jurisdiction and even if it is erroneous. It can interfere only if the order is without jurisdiction. It was contended by Mr. Baldeva Sahay that in this case the Collector, who is vested with final powers to determine the matter, rightly or wrongly, came to the conclusion that the tenant was not entitled to relief by way of reduction of rent. That order, he contended, became final between the parties, and the Board of Revenue had no jurisdiction to set aside that order except on the ground that the Collector exercised a jurisdiction not vested in him by law or that he refused to exercise a jurisdiction vested in him by law. In this connection reference was made to the decision of the Letters Patent Bench which affirmed the decision of the single Judge in the case referred to above, 24 Pat. 234.[2] So far as this Court is concerned, the law seems to have been settled that the orders of the Collector on appeal under S. 112B, Bihar Tenancy Act, are final except where they can be shown to have been passed without jurisdiction. The difficulty arises when this dictum has to be applied to the facts of a particular case. In the present case the Rent Reduction Officer had decided that the tenant could claim reduction of rent under the provisions of cl. (d) of S. 112A (1). On the other hand, the Collector decided that the tenant could not invoke the aid of that clause. Can it be said that the Collector in so deciding exercised a juris-

diction not vested in him or refused to exercise a jurisdiction vested in him? Mr. Baldeva Sahay rightly pointed out that, in coming to the decision arrived at by the learned Collector, he may have been in error in applying the provisions of the Bakasht Restoration Act or of the Bihar Tenancy Act. But that would not amount to a refusal to exercise jurisdiction. It must also be noted that it is no party's case in the present instance that the Collector had not the jurisdiction to entertain the appeal. Hence, the position is that the Collector was clothed with the authority to entertain the appeal. The subject-matter of the appeal and the parties to it were properly before him. The only question which he had to determine was whether, in the circumstances of the case, the tenant was entitled to claim the benefit of cl. (d) of S. 112A (1), Bihar Tenancy Act. The two Courts took contrary views of the rights of the parties. But can it be said that the learned Collector exercising appellate powers, had no jurisdiction to come to the conclusion at which he actually arrived? This is certainly not a case of initial want of jurisdiction, nor is it a case of exceeding a jurisdiction. Then, is it a case of refusal to exercise a jurisdiction? In my opinion, clearly it is not so. It has not been contended that material irregularity in the exercise of jurisdiction could vitiate the decision of the learned Collector or could attract the general power of superintendence said to be vested in the Board of Revenue. It must, therefore, be held that the appellate orders of the learned Collector, setting aside the orders of the Rent Reduction Officer reducing the rent, were not without jurisdiction, and, therefore, binding upon the parties, and the orders of the Board of Revenue were, therefore, null and void as having been passed without jurisdiction. In that view of the matter, this part of the judgment of the learned Subordinate Judge must be set aside, and that of the Munsif restored. As success is divided between the parties, it is directed that each party will bear its own costs throughout.

**Mukharji J.**—I agree.

R.G.D. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 179** *[C. N. 64.]*

RAY J.

*Governor-General in Council — Petitioner* v. *Piramal Marwari — Opposite Party.*

Civil Revn. No. 114 of 1947, Decided on 29-7-1947, from order of Sub-Judge, Dhanbad, D/- 20-1-1947.

**Civil P. C. (1908), S. 82 — Decree not specifying time within which it shall be satisfied — Decree, if void—Executability of such decree.**

**The Judge in passing a decree against the Crown has not only to pronounce that the Crown is liable either to pay some money or to do some act but has also to specify a time within which the decree will have to be satisfied. In case he does comply with that provision, he has a further act to do, namely, to send a report to the Provincial Government in case of non-satisfaction of the decree within the time specified by him in it. Till three months after such a report, the decree must remain in the state of its preliminary stage. Where the Judge performs only the first part of his duty, namely, adjudication of the respective rights of the parties, the decree is not void but incomplete. There are two other parts to be done by him, namely, to specify a time and after the lapse of the time in case of non-satisfaction of the decree, to submit a report; till then the decree is incomplete and not final nor executable. Under the circumstances, however, if the executing Court refuses to execute a decree which is in its preliminary stage, it does not thereby violate the principle that the executing Court should not go behind the decree.** [Para 5]

Annotation : ('44-Com.) C. P. C., S. 82, N. 1.

*Nitai Chandra Ghosh* — for Petitioner.

**Order.** — The petitioner is the Governor-General in Council which means according to the provisions of S. 79, Civil P. C., the Crown, the petition is directed against an order of the executing Court rejecting the petitioner's objection that the decree was not executable.

[2] The circumstances under which this contention was raised are that the opposite party obtained a Small Cause Court decree against the Crown in the name of Governor-General in Council and the decree did not comply with the mandatory provisions of S. 82, Civil P. C. The mandatory provisions of the section requires that a time shall be specified in the decree within which it shall be satisfied. The contention was that until all the requisite conditions laid down in S. 82 (1) are fulfilled according to the provisions of sub-s. (2) of the section execution shall not be issued. To understand the contention, S. 82 has to be quoted *in extenso* :

"(1) Where the decree is against the Crown or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Provincial Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report."

The submission is that in view of the provisions of the section until expiry of three months computed from the date of a report by the Court to the Provincial Government for its orders execution cannot be levied.

[3] As against this, the learned executing Court has said that as an executing Court, he cannot go behind the decree unless it is established to be void. In this view of the matter, he purports to hold that as the decree has not been shown to be void, it must be put into execution. Execution cannot be refused on the assumption that what the Court passing the decree had to do has failed to do.

[4] Mr. N. C. Ghosh appearing for the petitioner does not go so far as to say that the decree, as it stands, is void, but all the same he wants to maintain that it is not executable. This contention, however, is not clear to me.

[5] But, in my view, the decree, though not void, is incomplete. The Court in passing a decree against the Crown has not only to pronounce that the Crown is liable either to pay some money or to do some act but has also to specify a time within which the decree will have to be satisfied. In case he does comply with that provision, he has a further act to do, namely, to send a report to the Provincial Government in case of non-satisfaction of the decree within the time specified by him in it. Till three months after such a report, the decree must remain in the state of its preliminary stage. It may be likened to a decree subject to certain conditions. Suppose there is a compromise decree in which the parties agreed as to declaration of certain rights and liabilities and at the same time fixed certain conditions before which they agreed that the operative part of the decree should not be put into execution. In that case even though the decree is not void nor erroneous is still not executable until the conditions are fulfilled. We know the distinction between the decrees preliminary and decrees final. I should say that the Court that sat upon judgment in the suit against the Crown has only performed the first part of his duty, namely, adjudication of the respective rights and liabilities of the parties. There are two other parts to be done by him, namely, to specify a time and after the lapse of the time in case of non-satisfaction of the decree, to submit a report; till then the decree is incomplete and not final nor executable. Under the circumstances, however, if the executing Court refuses to execute a decree which is in its preliminary stage, he does not thereby violate the principle that the executing Court should not go behind the decree.

[6] I learn that the Court before whom the decree was sought to be executed is the Court that had passed the decree. I should, therefore, direct that he should now proceed to complete the decree in terms of S. 82. Civil P. C., and it is then only that the judgment-debtor will be entitled to put the decree into execution. In this view of the matter, this petition is allowed and the case is sent back to the Court below for compliance with the directions given above. As there is no appearance for the opposite party, there will be no orders as to costs.

R.G.D. *Case remanded.*

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## A I. R. (35) 1948 Patna 180 *[C. N. 65.]*

MEREDITH J.

*Emperor* v. *Haribandhu Patro.*

Criminal Ref. No. 2 of 1947, Decided on 2-4-1947, made by Addl. Dist. Magistrate, Ganjam Chatrapur, D/- 17 2-1947.

**(a) Criminal P. C. (1898), Ss. 438 and 523—Scope of S. 438 — Order under S. 523 — Reference under S. 438 is competent.**

There is no warrant for confining references under S. 438, which is in very wide terms, to cases of conviction, bail, etc., in judicial proceedings. An order under S. 523 directing delivery of the article seized to a certain person is judicial and not an administrative order and a reference can be made under S. 438 in respect of it. **[Para 4]**

**Annotation:** ('46-Com.), Cr. P. C., S. 438, N. 7a.

**(b) Criminal P. C. (1898), S. 523 — Article to whom should be delivered.**

Under S. 523 the article should be made over not to the person from whom it was seized but to the person found entitled to possession. What is the proper order to pass under S. 523 must depend upon the facts of each case. Where property is taken by violence the Magistrate should order restoration of the *status quo.* **[Para 5]**

*B* purchased a bus and held the licence and the route permit and was plying the same. The accused took away the bus by violence from *B's* driver on the ground that they had contributed some portion of the money with which *B* purchased the bus and *B* did not give them their share of the profits:

*Held*, that the bus should be returned to *B* and not to the accused from whom it had been seized by the Police **[Para 5]**

**Annotation:** ('46-Com.), Cr. P. C., S. 523, N. 6.

*Cases referred*:—

1. ('27) 54 Cal. 283 : 14 A. I. R. 1927 Cal. 532 : 102 I. C. 482.
2. ('33) 56 Mad. 654 : 20 A. I. R. 1933 Mad. 434 : 143 I. C. 510.
3. ('36) 60 Bom. 183 : 23 A. I. R. 1936 Bom. 171: 162 I. C. 265.
4. ('44) I.L.R. (1944) Lah. 540 : 32 A. I. R. 1945 Lah. 47: 221 I. C. 34.
5. ('33) 20 A. I. R. 1933 Cal. 149 : 144 I. C. 78.
6. ('43) 30 A. I. R. 1943 Mad. 392 : 206 I. C. 591.

*P. B. Ganguly* — for Reference.
*G. C. Das* — against Reference.

**Order.** — This is a reference under S. 438, Criminal P. C., made by the learned Additional District Magistrate, Ganjam, in the following circumstances. A first information report was lodged by the driver of one B. Kantaya of the Krishna Motor Service before the police of Parlakemedi, alleging that the bus O. R. G. 3 which had been entrusted by B. Kantaya to him for plying was taken away by certain persons. The police on investigation found that the persons complained against were claiming to have contributed some portion of the money with which B. Kantaya purchased the bus and that as B. Kantaya did not give them their share of the profits they took away the bus. Hence the police submitted a final report, stating that it was a case of civil nature

[2] On 8-11-1946, during the pendency of the proceedings the Magistrate handed the bus over to Kantaya upon his executing a bond for Rs. 15,000, but on 25th November after the police final report the Magistrate ordered that the bus should be made over to the persons from whom the police had seized it, that is to say, to the accused.

[3] The learned District Magistrate recommends that this order be set aside. He points out that under S. 523, Criminal P. C., property which is seized by the police is to be returned, not to the person from whom it was seized but to the person found entitled to the possession thereof. In the present case, he says, there was no dispute as to the person entitled to the possession of the bus, as the bus had been registered in the name of B. Kantaya who also held the route permit and had been plying the service bus. The Magistrate had not come to any definite finding that the accused persons were those entitled to possession. The District Magistrate considered, therefore, that in the circumstances as the act of the accused was nothing but an act of violence under a colour of a civil claim the bus should have been left with B. Kantaya to whom it was originally made over.

[4] It is argued before me that the learned Magistrate had no jurisdiction to make this reference under S. 438, because such references must be confined to cases of conviction, bail and so on in judicial proceedings. I find no warrant, however, for restricting the operation of S. 438, which is in very wide terms, in this way. Moreover, the order in regard to which the reference was made was an order in judicial proceedings, in the course of which a protest petition treated as a complaint had been made by Kantaya and dismissed under S. 203. It is said that the order of the Magistrate was not a judicial but an administrative order. I cannot agree with that It was an order under S. 523, Criminal P. C., and as such was a judicial order. Section 523 entitles the Magistrate to inquire judicially into the question, who is entitled to the possession of the article.

[5] Finally it is said that on the merits the Magistrate's order was correct, and as the police had reported no offence was committed the proper course was to return the bus to the person from whom the police had seized it. As I have already said, S. 523 does not say so, but that the article should be made over to the person found entitled to possession. A number of rulings have been cited against the reference, namely, *Sattar Ali* v. *Afzal Mohamad* (54 Cal. 283[1]), *Karuppanan* v. *Guruswami* (56 Mad. 654[2]), *Lakshmichand Rajmal* v. *Gopikisan Balmukund* (60 Bom. 183[3]) and *Ghulam Ali* v. *Emperor* [I. L. R. (1944) Lah. 540[4]]. All these cases, however, are authorities only upon their own particular facts, and what is the proper order to pass under S. 523 in each case must depend upon the facts of that particular case. In *Rama Aiyar* v. *Das Gupta* (A. I. R. 1933 Cal 149[5]) it was held that the Magistrate has a right to order the resumption of the *status quo*, so that the rights of the parties might be determined in the civil Court, and in *Nallusami* v. *Nallammal* (A. I. R. 1943 Mad. 392[6]) it was held that the Magistrate should order restoration of property taken by violence. There seems to be no doubt in the present case that the bus was taken by violence from Kantaya's driver. The restoration of the *status quo* would be to return it to Kantaya, or his driver, the complainant. As the learned Additional District Magistrate has pointed out, in this case Kantaya had purchased the bus, and he held the licence and route permit. In the circumstances of this case, and particularly having regard to the fact that the Magistrate had originally made the bus over to Kantaya on 8th November, and subsequently took it away from him again, I think the view of the learned District Magistrate is the correct one. I, therefore, accept this reference, and direct that the bus be handed over, as recommended by the learned Additional District Magistrate.

G.N. *Reference accepted.*

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**A. I. R. (35) 1948 Patna 181** *[C. N. 66.]*

DAS J.

*Birsa Uraon—Appellant* v. *Mahadeo Uraon and others—Respondents.*

A. F. A. D. No. 1232 of 1946, Decided on 29-4-1947, from decision of Sub-Judge, Ranchi, D/- 30-3-1946.

Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 73—Order of Deputy Commissioner under S. 73 — Finality — Decision on question of title when there is no abandonment — Whether binding on civil Court—Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 258.

Under S. 258, Chota Nagpur Tenancy Act, the order of the Deputy Commissioner under S. 73 of the Act has the force and effect of a decree of a Civil Court in a suit between the parties, and is final subject to the provisions of the Chota Nagpur Tenancy Act relating to appeal, except where the order is bad for want of jurisdiction. The abandonment of the holding as contemplated by sub-s. (1) of S. 73 is the foundation of the jurisdiction for the summary decision by the Revenue Officer. Even if sub-s (1) applies in a case where the recorded tenant has died without any heir and there is nobody either to cultivate the land or to pay rent to the landlord, it cannot apply where there is no abandonment, as where there is an heir who is cultivating and willing to pay rent, and in such a case there is nothing in sub-s. (2) of S. 73 which would entitle the Deputy Commissioner to decide a question of disputed title or inheritance in order to assume jurisdiction where he had no such jurisdiction. To allow the Deputy

Commissioner to do so would be to convert the Rent Court into a Court for determining questions of title, in circumstances where such questions do not arise. In such a case the decision of the Deputy Collector on the question of title is not binding on the Civil Court, his action being in excess of jurisdiction. [Paras 2 and 3]

*A. K. Chatterji*—for Appellant.
*L. J. Choudhury*—for Respondents.

**Judgment.** — The appellant who was the plaintiff in the Court of first instance had brought the suit for a declaration of this title to, and recovery of possession of, two plots of land, 1051 and 1120, comprised in holding No. 78 of village Dublia. The plaintiff alleged that the land in question was recorded in the name of Chunda Uraon, and Chunda Uraon having died without any heir, the landlord took khas possession of the land by virtue of an order of the Deputy Commissioner under S. 73, Chota Nagpur Tenancy Act. Thereafter, the landlord settled the land with the plaintiff. Defendant 1, who was the contesting defendant, alleged that Chunda had died leaving behind him his brother Thurwa and his mother Mt. Karmi. Thurwa was the heir of Chunda Uraon, and the order of the learned Deputy Commissioner under S. 73, Chota Nagpur Tenancy Act, was without jurisdiction, inasmuch as there was no abandonment of the holding by the recorded tenant or his heir.

[2] The only question which arises for decision in this appeal is if the order of the learned Deputy Commissioner under S. 73, Chota Nagpur Tenancy Act, was without jurisdiction. Under S. 258, Chota Nagpur Tenancy Act, the order of the Deputy Commissioner under S. 73 of the Act has the force and effect of a decree of a civil Court in a suit between the parties, and is final subject to the provisions of the Chota Nagpur Tenancy Act relating to appeal, except where the order is bad for want of jurisdiction. It appears that when a notice was issued under S. 73 (2), Chota Nagpur Tenancy Act, Thurwa appeared before the Deputy Commissioner, and claimed to be the heir of Chunda. This claim was not, however, allowed by the learned Deputy Commissioner, who held that Thurwa was not the brother of Chunda. If the aforesaid order or decision of the learned Deputy Commissioner under S. 73 (2), Chota Nagpur Tenancy Act, is a good order (that is, an order with jurisdiction), then it is clear that it has the force and effect of a decree of a civil Court, and is final between the parties. In that case, the respondents cannot be allowed to go behind the decision or order of the learned Deputy Commissioner. This seems to me to be the clear effect of S. 258, Chota Nagpur Tenancy Act.

[3] The Courts below have, however, found that the order of the learned Deputy Commissioner under S. (73) (2), Chota Nagpur Tenancy Act, was without jurisdiction, inasmuch as there was no abandonment of the holding by the recorded tenant or his heir and in passing the order complained against, the Revenue Officer acted without jurisdiction. It has been contended before me on behalf of the appellant that the Courts below were wrong in their view that the order or decision of the learned Deputy Commissioner was without jurisdiction and that it was open to the learned Deputy Commissioner to decide whether Thurwa was or was not the heir of Chunda Uraon, and even if the decision of the learned Deputy Commissioner was wrong, it is binding on the parties. In my judgment, the Courts below were right in their view that the learned Deputy Commissioner had no jurisdiction to decide questions of title or inheritance, when there was no abandonment of the holding. To allow the Deputy Commissioner to do so would be to convert the rent Court into a Court for determining questions of title, in circumstances where such questions do not arise. Sub-section (1) of S. 73 says that if a raiyat voluntarily abandons the land held or cultivated by him, without notice to the landlord, and ceases either himself or through any other person to cultivate the land and to pay his rent as it falls due, the landlord may, at any time after the expiration of the agricultural year in which the raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take it into cultivation himself. The abandonment of the holding as contemplated by sub-s. (1) is, therefore, the foundation of the jurisdiction for the summary decision by the Revenue Officer. It has been contended before me that this sub-section applies not only in the case of a voluntary abandonment by the recorded tenant, but also in a case where the recorded tenant has died without any heir and there is nobody either to cultivate the land or to pay rent to the landlord. It is doubtful if the sub-section, in its terms, applies to such a case. Assuming, however, that it applies in a case where the recorded tenant has died without any heir, I do not see how it can apply in a case where there is an heir who is cultivating and willing to pay rent, and I can find nothing in sub-s. (2) of S. 73 which would entitle the Deputy Commissioner to decide a question of disputed title or inheritance in order to assume jurisdiction where he had no such jurisdiction. Under sub-s. (2) of S. 73, before a landlord enters on the land, he shall send a notice to the Deputy Commissioner, and the Deputy Commissioner shall cause a notice to be published. If an objection is preferred to the Deputy Commissioner within one month of the date of publication of the notice, the Deputy Commissioner shall make a summary enquiry and shall decide whether the landlord is entitled under sub-s. (1) to enter on the holding. There is nothing in this sub-section which em-

powers the learned Deputy Commissioner to decide a disputed question of title or inheritance, and give a summary decision in favour of the landlord when the foundation of his jurisdiction, namely, abandonment of the holding is absent. I am, therefore, of the view that the learned Deputy Commissioner acted in excess of jurisdiction when he found that Thurwa Uraon was not the heir of Chunda Uraon, and held that the landlord was entitled to enter the holding under sub-s. (1) of S. 73.

[4] In this view of the matter the civil Court was competent to decide the question if Thurwa Uraon was the brother and heir of Chunda Uraon. The Courts below have concurrently found that Thurwa was the brother and heir of Chunda, and that finding cannot be challenged in second appeal. The result, therefore, is that the appeal fails and is dismissed with costs.

R.G.D. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 183 *[C. N. 67.]*

SINHA AND MUKHARJI JJ.

*Dalgobinda Mahatha and others — Defendants — Appellants* v. *Khatu Mahatha and others, Plaintiffs and others, Defendants — Respondents.*

A. F. A. D. No. 1152 of 1944, Decided on 17-9-1947, from decision of Sub-Judge, Purulia, D/- 27-6-1944.

**(a) Civil P. C. (1908), O. 6, R. 2 — In order to appreciate the true character of the suit, one should read the plaint as a whole.** [Para 3]

Annotation: ('44-Com.) Civil P. C., O. 6, R. 2, Note 10, Pt. 8.

**(b) Civil P. C. (1903), O. 1, R. 8 — Village track —Obstruction to — Suit in representative capacity — Village cart track, held not public highway — Special damage, if should be proved — Civil P. C., (1908), S. 91 (1).**

In a suit filed in accordance with O. 1, R. 8, the plaintiffs alleged that the defendants had converted portions of a village cart track into paddy fields and though there was nothing to show that the plaintiffs had their houses by the side of the pathway, the allegations in the plaint stated that as a result of the action complained of neither men nor cattle nor carts of the plaintiffs could use the pathway as they had used it so long, and that as a result of the action of the defendants, the public had been put to great inconvenience. The question was whether the path in question was a public highway and therefore whether the suit as laid was maintainable in view of S. 91 (1):

*Held* (i) that the path could not by any means be called a public highway. The word "public" used in the plaint referred to the limited public of the villages of which the plaintiffs were the representatives. The suit as laid, therefore, was proper; [Para 3]

(ii) that the principle to be borne in mind in such cases was that a person of an immediate community or section of the public who was deprived of the amenity provided for that particular section might be deemed to have suffered loss without proof of such loss. No special damage thus need be proved in such a case. It would suffice if it was shown that a particular section of the public had been deprived of certain advantages which it had enjoyed so long: 28 A. I. R. 1941 Pat. 249 and 24 A. I. R. 1937 Pat. 620, *Rel. on*; 27 A. I. R. 1940 Pat. 449, *Expl.* [Para 4]

Annotation: ('44-Com.) Civil P. C., S. 91 Note 3; O. 1 R. 8 Note 7.

*Cases referred:*—

1. ('41) 22 P. L. T. 46 : 27 A. I. R. 1940 Pat. 449 : 19 Pat. 208 : 190 I. C. 46, Bibhuti Narayan Singh v. Sir Guru Mahadev Asram Prasad.
2. ('41) 28 A. I. R. 1941 Pat. 249 : 192 I. C. 760, Dasrathi Mahto v. Narain Mahto.
3. ('37) 18 P. L. T. 737 : 24 A. I. R. 1937 Pat. 620 : 171 I. C. 933, Pahlad Maharaj v. Gauri Dutt.

*R. S. Chatterji* — for Appellants.
*S. C. Mazumdar* — for Respondents.

**Mukharji J.** — This second appeal is by the defendants. Plaintiffs, Khetu Mahatha and others brought Title Suit No. 89 of 1942 in the Court of the Munsif of Raghunathpur alleging that the defendants had converted portions of a village cart track into paddy fields. The suit was filed in accordance with the provisions of O. 1, R. 8, Civil P. C. Of the six plaintiffs, 1 to 3 are residents of village Damudih. Plaintiff 4 belongs to another village, but it is said that he has cultivation in village Damudih. The remaining two plaintiffs are the residents of neighbouring villages. The alleged cart track is said to connect two District Board Roads. Admittedly a portion of the cart track passing through Survey Plot No. 1480 has been shown in the survey map. According to the plaintiffs the cart track in question has been in existence for over 100 years, and it has been used by the public of the locality. The defendants put in their appearance and contested the suit. According to them the suit was not maintainable in the form in which it was presented by the plaintiffs. The learned Munsif took up the question of maintainability of the suit raised in issue 2, and gave his decision that the suit is not maintainable in view of the provisions of S. 91 (1), Civil P. C. He accordingly dismissed the suit with costs. The plaintiffs not satisfied with this decision preferred an appeal which was heard by the learned Subordinate Judge of Purulia. The learned Subordinate Judge took the view that the suit is maintainable, and he allowed the appeal, set aside the finding of the learned Munsif and remanded the suit for disposal according to law. As for costs of the appeal, the learned Subordinate Judge directed that the same will abide the final result of the suit in the trial Court. Hence this second appeal by the defendants.

[2] On behalf of the defendants-appellants it has been contended that the decision of the learned Subordinate Judge is wrong. It is said that even according to the admission of the plaintiffs-respondents in the plaint the path in question is a public path in which the general public is interested. The learned advocate for

the appellants had referred to a decision reported in 22 P. L. T. 46.[1] One interesting feature of the present case is that both the learned Courts below have cited this ruling in support of their respective findings. This ruling lays down that where a suit is brought under O. 1, R. 8, Civil P. C., the plaintiff must plead and show that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right of suit. Their Lorhships further observe that in such a case the plaintiff must plead and show that the pathway in question is not a public highway in the full sense in which all members of the public who happen to go to the place have equal interest. The plaintiff has further to show that it is a way or path of the quasi public type in which the class he represents has got special rights as distinct from those of the public generally. According to the learned Munsif the requirements laid down in 22 P. L. T. 46[1] have not been fulfilled in the present case. The learned Subordinate Judge, on the other hand, has held that the conditions are satisfied. The learned Subordinate Judge is also of opinion that it is a case in which it can be said that the plaintiffs according to the allegations in the plaint have suffered special damage. Admittedly where special damage is claimed, in such a case the suit need not come either under S. 91, Civil P. C., or under O. 1, R. 8, Civil P C.

[3] I have carefully perused the plaint. It is true here and there there are expressions which at first sight will lead one to think that the path is a public one over which the general public have got full rights, but in order to appreciate the true character of the suit, one should read the plaint as a whole. The path in question, as described in the plaint, can by no means be called a public highway. More than at one place in the plaint the path has been described as a cart track. In para. 4 of the plaint it is said that the people of Damudih and its adjoining villages used the *rasta* for their ingress and egress and also for their cattle and bullock-carts. It is further said in the same paragraph that the plaintiffs carry their paddy straw, earth, fertilisers, etc., to their respective villages over this path. In para. 7 there is a clear recital that there are pasture lands towards the south and that as a result of the encroachment of the road the cattle of the plaintiffs can no longer have access to these pasture lands. It is true there is mention in the same paragraph that as a result of the action on the part of the defendants the public have been put to great inconvenience, but it is clear that the word "public" used in para. 7 refers to the limited public of the villages of which the plaintiffs are the representatives. In para. 2, there occurs the following description of the pathway in question "*Ekti nirdista sadharaner sagarat rasta haitechhe.*"

This is in Bengali, and it means that the pathway is a cart track of a particular public. A careful perusal of the plaint leaves no manner of doubt that according to the plaintiffs the path is of a quasi-public type in which only the people of Damudih and the adjoining villages are interested. Therefore, in my opinion, the plaintiffs could very well frame their suit in accordance with the provisions of O. 1, R. 8, Civil P. C.

[4] The learned Munsif has also referred to the case reported in A. I. R. 1941 Pat. 249.[2] In this case a certain roadway which passed the houses of several persons was obstructed. It was held that the persons so affected will be deemed to have special cause of action, and it was not necessary for them to prove special damage. He has distinguished the reported case from the present case on the ground that the pathway with which we are concerned does not pass the houses of the plaintiffs. It is true there is nothing to show that the plaintiffs have their houses by the side of the pathway, but the allegations in the plaint state in no unmistakable terms that as a result of the action complained of neither men nor cattle nor carts of the plaintiffs can use the pathway as they have used it so long. The principle to be borne in mind in such a case has been laid down in 18 P. L. T. 737.[3] A person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. No special damage thus need be proved in such a case. It will suffice if it is shown that a particular section of the public has been deprived of certain advantages which it has enjoyed so long. In the present case the villagers whom the plaintiffs represent are said to have been put to serious inconvenience as a result of the alleged conversion of portions of the road into paddy field. As already stated, not only men and carts find it impossible to use the road but the cattle also cannot have easy access to the pasture lands. I think it can be said that the plaintiffs have got special cause of action as held in A.I.R. 1941 Pat. 249[2] and 18 P. L. T. 737.[3] Taking everything into consideration, I am inclined to the view that the suit, as framed, is maintainable. The appeal, therefore, fails, and it is dismissed with costs.

**Sinha J.** — I agree.

R.G.D. *Appeal dismissed.*

**A. I. R. (35) 1948 Patna 185** *[C. N. 68.]*

MANOHAR LALL J.

*Pradip Singh — Plaintiff — Appellant* v. *Ambika Singh and others—Respondents.*

A: F. A. D. Nos. 576 and 577 of 1945, Decided on 2-9-1947, from decision of Sub-Judge, Gaya, D/- 17-4-1945.

**(a) Civil P. C. (1908). S. 100 — Question of law — Inadmissibility of evidence.**

**Inadmissibility of certain documents in evidence for want of registration is a question of law and can be raised for the first time in second appeal.** [Para 7]

**Annotation : ('44-Com.) C. P. C., Ss. 100, 101, N. 27.**

**(b) Civil P. C. (1908), S. 100 — Finding based on admissible and inadmissible evidence — No ground for interference in second appeal — Evidence Act, S. 167.**

**Where apart from the inadmissible evidence there is other evidence in the case which entitles the Court to come to a particular finding of fact, the fact that reliance was placed on inadmissible evidence is no ground for interference in second appeal.** [Para 8]

**Annotation: ('44-Com.) C. P. C., Ss. 100, 101, N. 27, Pt. 4.**

*Cases referred:*—

**1.** ('10) 37 Cal. 293 : 4 I. C. 713, Durga Prasad Singh v. Rajendra Narain Bagchi.

**2.** ('13) 41 Cal. 493 : 40 I. A. 223 : 21 I. C. 750 (P.C.), Durga Prasad Singh v. Rajendra Narain Bagchi.

*Lalnarain Sinha and Shambhu Pd. Singh* — for Appellant.

*Sarjoo Prasad and Devendra Prasad* — for Respondents.

**Judgment.** — These appeals were originally heard by two learned Judges of this Court but as they differed upon the applicability of the provisions of the Registration Act to certain hukumnamas, the entire appeals have been referred to me by the learned Chief Justice for disposal under R. 5, Chap. 2, Part 1 of the Patna High Court Rules.

[2] When the appeals were argued before me it appeared on a perusal of the judgments of the Courts below that besides the hukumnamas, there was other evidence, both oral and documentary, which enabled the Courts below to come to the conclusion that there was commutation of rent of the holdings in suits. Accordingly, I asked the learned advocate for the appellants and the respondents to satisfy me whether in the face of these clear findings it was still necessary to decide the point of law on which the learned Judges differed. The learned advocates agreed that even if the hukumnamas were inadmissible on account of non-registration, there was other evidence in the case which supported the finding of fact arrived at by the two Courts below.

[3] I have read and re-read the judgments of the two learned Judges and the judgments of the Courts below, and I have also read and re-read the entire evidence in the case, and I am compelled to take the view that the question of law upon which the learned Judges differed does not really arise for decision in the present case, and accordingly I do not decide that question which is academic for the purpose of these appeals.

[4] The facts of the appeals are extremely simple. The claim of the plaintiff-respondents was for arrears of bhaoli rent for the years stated in the plaints of the two suits. The defence was that the predecessors-in-interest of the plaintiffs had commuted the rentals on a cash basis. In support of that, apart from the oral evidence, some hukumnamas were produced and some rent receipts were relied on showing payment at the commuted rate. To this the plaintiffs replied that both the hukumnamas and the receipts were forgeries and the oral evidence in support of the commutation was unreliable.

[5] The trial Court came to the conclusion (1) that the hukumnamas were genuine; (2) that the receipts relied upon by the defendants are genuine; and (3) that the oral evidence of the defendants was reliable in support of commutation. Accordingly he decreed the plaintiff's suits for the amount at the rate of rent fixed in the hukumnamas and the receipts less payments made in cash.

[6] In appeal, the learned Subordinate Judge also came to the same conclusions but he observed at more than one place in his judgment that the defendants have been able to prove both by documentary and oral evidence that the outgoing landlord Shah Zaffar Sajjad commuted the bhaoli rent into nakdi before he transferred his interest to the plaintiff-appellant. At page 12 of the judgment he says that the learned Munsif was justified in accepting the evidence of D. W. 2 that the hukumnamas were duly executed, and then observed that these hukumnamas are not the only evidence of commutation but they were followed by receipts showing realisation of cash rent for the holdings in suits, and he goes on to give reasons why he does not believe the plaintiff's case that the receipts were forgeries. He also gave reasons why he disbelieved the plaintiff's evidence when he put forward certain laggits and arrear list said to have been received from the previous landlord to show that the arrears did not contain any cash arrears for the holdings in suits but the arrears were at bhaoli rate.

[7] In second appeal to this Court, the point as to non-registration of the hukumnamas and therefore their inadmissibility was raised for the first time. No such question was raised in the Courts below, but this being a question of law was rightly allowed to be raised in second appeal.

[8] In my view, however, as stated already,

the question does not arise for decision as the findings of the Courts below, referred to above, were that apart from the hukumnamas there was other evidence in the case which entitled the Courts below to come to findings of fact that the rent of the holdings have been commuted—the fact that reliance was placed on inadmissible evidence is no ground for interference in second appeal (*see* S. 167, Evidence Act.)

[9] Bennett J. in the concluding portion of his judgment has observed that as the Courts below held that the receipts were genuine documents, there was no reason for differing from the concurrent findings. But he proceeded to observe:

"These receipts, in themselves, however, are insufficient to discharge the burden of proof of a permanent commutation from bhaoli to naqdi, since they are equally consistent with a temporary concession or agreement restricted solely to the year in question in each case."

With the greatest respect, this was a new case and should not have been allowed to be raised in second appeal. In the Courts below the contest between the parties was whether the hukumnamas and the receipts evidenced a temporary commutation. The evidence of the defendants' witness starting from D. W. 2 was to the effect that the commutation was for all times. The defendants relied in support of their defence not only on the hukumnamas but also on the receipts and on the oral evidence. It was not suggested to any of the witnesses of the defendants in cross-examination that the commutation was a temporary commutation for one year only. In these circumstances, it appears to me that the learned Judge was in error in investigating for himself for the first time in second appeal the question of fact which was not raised in any of the Courts below. The question would have been entirely different if the parties had differed on the interpretation of a document of title as was the case in 37 Cal. 293[1] approved by the Privy Council in 41 Cal. 493.[2]

[10] In these circumstances, in my opinion, these appeals are concluded by findings of fact and must be dismissed with costs.

D.R.R. *Appeals dismissed.*

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## A. I. R. (35) 1948 Patna 186 *[C. N. 69.]*

REUBEN AND BENNETT JJ.

*Abdul Hasan — Plaintiff — Appellant* v. *Mt. Wajih-un-nissa and others — Defendants — Respondents.*

A. F. A. D. No. 328 of 1946, Decided on 24-9-1947, from decision of Addl. Dist. Judge, Gaya, D/- 18-12-1945.

**(a) Deed—Execution—What amounts to—Intention of parties—Document, when operative — Evidence Act (1872), S. 92, Proviso 3.**

A mere signature does not necessarily and automatically render effective and operative the document to which it is appended. The signature of a document under a complete misapprehension as to the nature of the transaction therein set out, that is to say, under a mistake, does not render the document effective or operative. So also where there is an antecedent oral agreement between the parties to a written agreement that some or any obligation thereunder shall not arise until the fulfilment of some condition precedent, the document, although signed, will not (in so far as the obligation or obligations in question are concerned) become operative until the fulfilment of the condition precedent. Therefore, the term 'execution' in relation to a written document means the placing by the executant of his signature or other identification mark such as a thumb-print thereon in or accompanied then or later by circumstances which sufficiently demonstrate the intention of the executant to give effect and operation to the instrument signed by him. This is so whether the document contains a bilateral or a unilateral transaction: 20 A I.R. 1933 Pat. 129, *Ref.* (Case of sale-deed with antecedent oral agreement stipulating condition precedent for its operation.) [Para 8]

Annotation : ('45-Com.) T. P. Act, S. 54 N. 5.

**(b) Deed — Construction — Recitals — Use of—T. P. Act (1882), S. 8.**

Recitals in a deed of sale cannot be allowed to contradict the operative clauses if the latter are clear and unambiguous. [Para 6]

Annotation : ('45-Com.) T. P. Act, S. 8 N. 20 Pt. 16.

*Case referred* :—

1. ('33) 14 P. L. T. 727 : 20 A. I. R. 1933 Pat. 129 : 145 I. C. 698, Sundar Chaudhry v. Lalji Chaudhri.

*B. C. De and S. Anwar Ahmad* — for Appellant.

*S. N. Bose, S. S. Asghar Hussain and A. B. N. Sinha* — for Respondents.

**Bennett J.**—This is an appeal from a decision of the First Additional District Judge of Gaya, affirming the decision of the Second Subordinate Judge at Gaya in a suit in which the plaintiff, the appellant here, claimed a declaration for the return of a sale-deed, and in the alternative, if his own plea of possession be not successful, recovery of possession of the property which consisted of 8.12 acres of land.

[2] The facts leading to the suit are shortly that on 17-7-1932, the plaintiff mortgaged the land in dispute to defendant 1 for a sum of Rs. 600. Thereafter, the landlord obtained a rent decree against the plaintiff and in order to avoid the sale of the property defendant 1 deposited in Court the decretal amount. In money Suit No. 39 of 1935, defendant 1 sued the plaintiff for recovery of the amount so deposited and obtained a decree therefor. At a sale held in execution of that decree on 26-2-1937, defendant 1 purchased the property for Rs. 200 and on 26-8-1937, he got delivery of possession.

[2a] The plaintiff's case was that the sale processes had been suppressed and that when in December 1937, he learnt of the fraud, defendant 2, who is the husband of defendant 1, in order to avoid proceedings by the plaintiff for the setting aside of the sale, offered to re-convey

the property to the plaintiff if he would pay the amount then outstanding on the mortgage bond of 17-7-1932, plus the sum of Rs. 200 for which the property was sold to his wife, defendant 1. This the plaintiff agreed to and having collected all the necessary monies except Rs. 200—it was thereafter agreed that the plaintiff should pay the defendants those monies and should execute a *rehan* bond in respect of part of the property in question for the sum of Rs. 200. On 16-1-1938, the plaintiff paid Rs. 200, being the price of the land and Rs. 1050 towards the mortgage dues and a sale-deed was executed by defendant 1 in favour of the plaintiff and the plaintiff executed a *rehan* bond in favour of defendant 1, defendant 2 promising to return to the plaintiff the documents relating to the old mortgage of 17-7-1932. On the same day, the sale and the *rehan* bond were presented for registration before the Sub-Registrar, Gaya, and defendant 1 admitted the execution of the sale-deed before the Registrar and it was duly registered. The *rehan* bond, however, was not registered by the plaintiff because, as he alleged, the defendants, after executing and registering the sale-deed, refused to make over to the defendants the said documents relating to the old mortgage and in spite of repeated demands, put off the return of those documents. Therefore, on 31-1-1938, the *rehan* bond was returned to the plaintiff by the Sub-Registrar. The plaintiff alleged that he thereafter sent a registered notice to the defendants to get the *rehan* bond registered and to make over the documents and the sale-deed but the defendants refused.

[3] The defendants' case, except of course that they denied that there was any suppression of the sale processes in the execution case, is very largely the same as that of the plaintiff. They, however, denied that on 16-1-1938, the plaintiff paid them a single pice and they alleged that the substance of the transaction between the parties was an arrangement that the sale-deed and *rehan* bond of the property should be executed and registered simultaneously and that immediately thereafter the parties would exchange equivalents, the defendants exchanging the registered sale-deed and the documents relating to the old mortgage against the *rehan* bond and the cash. They alleged that on 16-1-1938, the amount due under the old mortgage of 17-7-1932, was Rs. 2124 but that no single pice of that amount had been paid to them. They further pleaded that they had been cheated and deceived by the plaintiff in that in reliance upon his promise to register the *rehan* bond simultaneously with the sale-deed and thereafter to exchange equivalents as above mentioned, they executed and registered the sale-deed but that immediately thereafter the plaintiff disappeared from the Registration Office and later on took back the *rehan* bond. They denied that he had ever asked to obtain registration of the *rehan* bond or that they had refused to return the documents in connection with the mortgage in pursuance of the agreement.

[4] Both the Courts below have found that the plaintiff paid nothing to the defendants in relation to the transaction in question and both Courts also found that the outstanding amount on the old mortgage of 17-7-1932 was Rs. 2124 as alleged by the defendants and not Rs. 1050 as alleged by the plaintiff.

[5] In addition to issues on the above points, a general issue, issue 3 was framed, namely, "Did any title pass on execution of the sale-deed by defendant 1 and is the plaintiff entitled to any relief therefrom?" Both the learned Subordinate Judge and the learned Additional District Judge, in reliance upon the recitals in the deed of sale, found on this issue that there was no doubt that the intention of the parties was that title would only pass when the mortgage debt had been cleared up, that is to say, when the consideration of monies had been paid and they, therefore, dismissed the plaintiff's suit.

[6] Mr. B. C. De, who appeared for the appellant, urged quite rightly that the recitals in a deed of sale could not be allowed to contradict the operative clauses if the latter were clear and unambiguous. The operative clauses of the deed of sale are as follows :

"8. Therefore, I, the executant of my accord and free will, in sound state of body and mind, and in full enjoyment of my senses, without instigation, inducement, intimidation and undue influence on the part of anybody else, sold and absolutely vended the whole and entire the abovementioned land for the said consideration to the said claimant, and having received the full payment of the consideration thereof in cash from the hand of the said vendee, brought the same to my possession and appropriation, and put the said vendee in possession and occupation of the vended property as an absolute proprietor in my place for all times to come. It is requisite for the said vendee to enter into possession and occupation of the said vended properties, to cultivate the same or get the same cultivated by others and to appropriate the produce thereof or deal with it any way he may deem proper. I, the executant and my heirs and representatives have and shall have no objection or contention thereto.

9. That I, the executant, shall raise no objection on the ground of non-realization of the consideration money or invalidity of the absolute deed of sale or the consideration money being insufficient. If at any time I bring forward any such objection, it is and shall be illegal and insufficient in the competent Court.

10. From this day the declarant or my heirs and representatives neither have nor shall have any connection and concern with the aforesaid lands.

11. Title Suit No. 66 of 1937, Mt. Bibi Razia plaintiff v. Malik Abdul Hasan claimant and I the declarant and others, defendants, has been instituted in respect of a portion of the aforesaid vended lands in the Second

Court of the Munsif at Gaya which is still pending disposal. I, the declarant and my heirs and representatives neither are nor shall be in any way and on any allegation bound by the results of that suit. The claimant and the other defendants to the said suit are and shall be fully bound by the said suit. The entire paddy crop grown in 1345 Fasli on the lands in suit was taken by the claimant. If future mesne profits will be awarded by the Court to the plaintiff to the aforesaid suit the claimant will be liable to pay the entire mesne profits. I, the declarant, will not be bound to pay the same. From this day I, the declarant shall cease to contest the said suit. The entire *pairvi* of the said suit is and shall be the concern of the claimant of this deed."

It is perfectly clear on the face of these provisions that the vendor purported by execution of the deed of sale to pass the title in the property immediately to the vendee.

[7] Mr. S. N. Bose for the respondents, however, raised three points, firstly, he urged that there had never been any full and proper execution of the deed of sale, secondly and in the alternative, he urged that looking at the recitals and the last clause of the deed of sale, to which I shall refer in more detail hereafter, taken together with the surrounding circumstances and the concurrent findings of fact made by the lower Courts, the respondents had established an oral agreement that no obligation should arise under the deed of sale until the exchange of equivalents as above-mentioned had taken place and, thirdly and in the further alternative, he urged that the recitals in the deed, the surrounding circumstances and findings of the lower Courts showed beyond any doubt that the defendants had been induced to execute and register the deed of sale in reliance upon a fraudulent representation made by the plaintiff that he would simultaneously or immediately thereafter execute the *rehan* bond and would thereafter exchange the *rehan* bond and the cash consideration for the deed of sale and documents relating to the old mortgage of 17-7-1932.

[8] We have no doubt that the term 'execution' in relation to a written document means the placing by the executant of his signature or other identification mark such as a thumb-print thereon in or accompanied then or later by circumstances which sufficiently demonstrate the intention of the executant to give effect and operation to the instrument signed by him. We take this to be the general law of England and India. The law of India does not, as does the law of England, require that a transfer of immovable property should be effected by a deed and the old technical necessity for delivery in the sense that the signatory must place his hand upon his seal and state that he delivers the document as his act and deed, is unnecessary in India, but that does not mean that a mere signature necessarily and automatically renders effective and operative the document to which it is appended. It is well-settled that the signature of a document under a complete misapprehension as to the nature of the transaction therein set out, that is to say, under a mistake, does not render the document effective or operative. Proviso 3 to S. 92, Evidence Act, shows clearly that where there is an antecedent oral agreement between the parties to a written agreement that some or any obligation thereunder shall not arise until the fulfilment of some condition precedent, the document, although signed, will not (in so far as the obligation or obligations in question are concerned) become operative until the fulfilment of the condition precedent. It is, therefore, clear that in order that a signature should render a document operative, it must be accompanied by an intention so to do. This is so, whether the document contains a bilateral or a unilateral transaction In 14 P. L. T. 727,[1] Courtney Terrell C. J. stated:

"Execution of a deed does not mean merely signing but it means all acts necessary to make the parties bound thereby. If a man merely signs the contract and puts it in his pocket and does not allow it to depart from him as his act that is not execution."

In this case, however, we are of opinion that the deed of sale was duly executed. In para. 19 of the written statement, the defendant stated *inter alia*: "The plaintiff could not have executed the *ijara* deed until he had acquired title under the sale deed." This statement implied *prima facie* that the defendants when they signed and registered the sale-deed did so *inter alia* in order that the *ijara* to be signed by the plaintiff should be valid and operative and that gives rise to the inference that by signature and registration the defendants intended to make the deed of sale effective and operative. In the face of this acknowledgment, we do not think that it now lies in the mouth of the defendant to say that when after signature he registered the deed of sale, he did not intend to make it operative.

[9] I turn therefore to Mr. S. N. Bose's second contention that the recitals and the last clause in the deed of sale taken together with the surrounding circumstances and the concurrent findings of fact made by the lower Courts established that there was an antecedent oral agreement between the parties that no obligation should arise under the deed of sale until the exchange of equivalents constituted a condition precedent to the passing of title to the plaintiff under the deed of sale. The recitals and the operative parts of the deed of sale are not separated one from the other, but the relevant portions of what constitutes the recitals are contained in para. 7 thereof which reads as follows:

"7. That the claimant, after arranging the amount, came to me, the executant along with his wife and

requested me to sell the lands purchased by auction to the claimant for the said consideration, as also to accept the payment of the amount in cash covered by the said bond which was still unpaid and which he had got with him, and to take in *rehan* with possession this day, 3 bighas 17 kathas and 11 dhurs of nakdi, kasht land for the balance of the amount which could not at present be paid by the claimant and to get a *rehan* bond with possession executed and admitted in my favour, and to return the said bond. Accordingly I, the executant, having agreed to the prayer of the claimant, deemed it proper to enter into the above mentioned transaction."

The transaction which is the subject of this paragraph is clearly not mere execution of the deed of sale but the agreement to accept, in exchange for the deed of sale and the return of the old mortgage bond, cash for part of the outstanding dues on the old mortgage bond and for the price of the land together with a *rehan* bond for the balance of the dues outstanding on the old mortgage bond. The last paragraph of the deed of sale reads as follows :

"Be it noted that I the declarant had got several original and certified copies of documents at the time of execution of the aforesaid bond (the mortgage bond of 17-7-1932) as also I had obtained certified copies of several documents for the protection of my title after the execution of the said bond the details whereof are given below. I shall make over the same to the claimant at the time of exchange of equivalents."

This paragraph clearly indicates that an exchange of equivalents was contemplated by the parties and that something besides these documents, namely, the deed of sale, was intended to be given in exchange by the defendants. It is important to note that the plaintiff, although he was not a party to the deed of sale, cannot deny the recitals therein, because it is upon this document that he founds his cause of action in the suit and he cannot, therefore, approbate and reprobate that document. The circumstances surrounding the agreement leading to the execution of the deed of sale by the defendants were the admitted facts that the plaintiff had allowed the property to be attached in execution of a rent decree obtained against him by the landlord and had compelled the defendants qua mortgagees to come in and pay off the decree and later to bring a suit against them for the amount. It is, therefore, in the highest degree improbable that the defendants would ever have been willing to part with the property in return only for a right to sue the plaintiff for the purchase price. Even more important is the fact that upon the purchase of the property by the defendants, the old mortgage merged in the ownership acquired by them, unless they exhibited a clear intention to the contrary. There was no suggestion of any such intention. Unless, therefore, the defendants were ensured of the receipt of the cash before parting with the title to the property, they would thereafter for ever have been barred from realising any part of the dues upon their old mortgage-bond. No man in his senses would, therefore, have executed and registered this deed of sale, which recited that the consideration of only Rs. 200 had been received by the vendor and debarred the vendor thereafter from alleging the contrary, without ensuring that the title to the land would not pass until the mortgage dues on the old mortgage bond, which would otherwise be wiped out, were first or simultaneously fully paid. Both the lower Courts found that the agreement alleged by the defendants leading to the execution of the deed of sale was true, that the plaintiff's contention that he had paid Rs. 1250 was untrue and that he had not paid a single pice of the consideration monies. They also found that the parties went together to the Registration Office intending to get both the deed of sale and the *rehan* bond executed. The operative clauses of the document themselves contemplate that the consideration should be paid before the execution thereof. Looking at these findings and the surrounding circumstances in the light of the recitals contained in the deed of sale itself and the express mention of an exchange of equivalents in the last paragraph, I am of opinion that the defendants have established a prior oral agreement under which the exchange of equivalents was a condition precedent to the passing of the title to the plaintiff under the deed of sale.

[10] Even if that were not so, I should still be of opinion that the defendants were entitled to succeed on the ground of fraud. The recitals, the surrounding circumstances and the findings of the lower Court, to which I have already adverted, give rise, in my opinion, to a necessary inference that the defendants, in executing the registered deed of sale, acted solely upon the plaintiff's representation that he would immediately thereafter register the *rehan* bond and effect the exchange of equivalents. The plaintiff's explanation as to why he did not register the *rehan* bond has been disbelieved by both the lower Courts and was indeed clearly unbelievable, involving as it did the contention that it was for the defendants to get the *rehan* bond registered. Once his explanation is disbelieved, the only inference is that the plaintiff disappeared from the Registration Office after the registration of the deed of sale by the defendants, with the fraudulent intention of obtaining the property without payment of the agreed consideration therefor. In those circumstances, the clear inference is that at the time he made the representations relied upon by the defendants, he did so fraudulently with intent, as they have alleged, to deceive and cheat them. That being so, the deed of sale is voidable and the defence upon

this ground must succeed. I would, therefore, dismiss this appeal with costs.

**Reuben J.**—I agree.

R.G.D. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 190** *[C. N. 70.]*

RAY J.

*Darsan Das — Appellant* v. *Lakshman Prasad and others—Respondents.*

A. F. A. D. No. 463 of 1946, Decided on 28-8-1947, from decision of Sub-Judge, Darbhanga, D/- 11-12-1945.

(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 23A Proviso — "Specific entry" — Record of rights — Entries in—Interpretation—Village notes — Use of —Record of rights—Village notes.

Village notes may not be record of rights by themselves, but they are authoritative records prepared by public servants in discharge of public duties and they can be used for the purpose of interpretation of entries in the record of rights. [Para 3]

The entry "bakabje raiyat" (meaning simply possession of the tenant) regarding certain trees standing on nakdi occupancy holding, was redundant under the law. But according to the village notes, the tenant was entitled to cut and appropriate the entire timber of the trees standing on the nakdi holdings:

*Held*, that, explained in the light of the village notes, the entry "bakabje raiyat" meant that the tenant was entitled to appropriate the timber and the landlord had no share in it. In this view, the entry was a "specific entry" and the case was governed by the proviso to S. 23A. [Paras 2, 3]

(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 23A Proviso—Specific entry in record of rights — Presumptive value—Evidence to rebut presumption — Proof of local custom if can rebut it.

The word "specific" in the proviso is used as an epithet to the word "entry." [Para 4]

A specific entry in the record of rights may owe its origin to a contract as between the parties, particularly where the record is against the local custom. Notwithstanding a local custom to the contrary, landlords and tenants as between themselves during the subsistence of the tenancy or at its inception may agree to a particular mode of enjoyment of the trees on the holding and the right to timber thereof. Every specific entry in the record of rights has a presumptive value. This entry is to be presumed to be correct till rebutted. Mere proof of local custom may or may not rebut it. [Para 4]

The plaintiff landlord brought a suit for damages being his half share of the price of the timber cut down and appropriated from a nakdi occupancy holding in possession of the defendants. The specific entry in the record of rights gave full rights in the timber to the tenants. The plaintiff based his case on a local custom giving him right to half the price of timber of any tree standing on the tenancy lands in village *S* (the village in which the disputed holding lay). To prove the custom, the plaintiff relied upon a decision of a civil Court upholding the landlord's claim to the right contended for in suits instituted by the plaintiff against certain other tenants in relation to other holdings in the same locality:

*Held*, that mere declaration of the local custom in a judgment of a suit or suits in relation to certain entries would not necessarily affect other entries which might have been based upon special contract. The tenant's case was well established when he could show that there was no civil Court decision affecting the entry in question. The suit, therefore, must fail. [Para 4]

*Lalnarayan Sinha, Kailash Ray and B. K. Sharma* — for Appellant.

*L. K. Jha and S. P. Srivastava*—for Respondents.

**Judgment.** — This is a plaintiff's second appeal in a suit for recovery of damages being his half share of the price of timber cut down and appropriated from a nakdi occupancy holding in possession of the defendants. The plaintiff based his claim on what he calls a well-established local custom giving him right to half the price of timber of any tree standing on the tenancy lands in Subhankarpur (the village in which the disputed holding lies). The defendants resisted the suit on the ground that it being a cash paying holding, they are entitled to cut and appropriate the entire timber of the trees standing on the land. They admit having cut only 100 trees and sold them for RS. 600. In short, the defendants seek to vindicate their right on the basis of the provisions of S. 23A, Bihar Tenancy Act. Both the Courts below have dismissed the plaintiff's suit. The trial Court recorded a finding in favour of the plaintiff's alleged custom. The custom, however, according to S. 23A is of no avail being inconsistent with the law promulgated therein.

[2] Mr. Lalnarayan Sinha appearing for the appellant has based his case on the proviso to S. 23A of the Act and a decision of the civil Court upholding the landlord's claim to half the price of the timber of trees cut down and appropriated by the tenants in nakdi holdings in this village in suits instituted by the plaintiffs against certain other tenants in relation to certain other holdings in the same locality. The proviso reads:

"Provided that if there is a specific entry in the latest record of rights regarding any tree which was standing on any land specified in cl. (a) before the date of the final publication of such record of rights, the rights of the landlord and the raiyat in the timber of such tree shall be in accordance with such entry or with any decision of a civil Court affecting such entry."

The question arises whether there is any specific entry in respect of the holding in question. The Khatian of the disputed holding is on record. In the remarks column of the khatian, after mentioning the number and kind of trees, it is stated "bakabje raiyat." This phrase simply means possession of the raiyat. There is no definition of the respective rights of the landlord vis a vis the tenant with regard to the timber of the trees; but this phrase cannot be intended to have been inserted simply to indicate possession of the raiyat. Taken in that sense it would be merely a redundant entry. As the holding was in possession of the tenant, necessarily the trees standing on it should be in his possession. The law, as it stood at the time

of the entry, would give the tenant untrammelled right to the produce of the land including that of the trees standing thereon. Some meaning bearing upon the rights of the parties to the timber must have been intended to be conveyed by the term. The entry, therefore, can be interpreted in the light of the village notes according to which the tenant is entitled to cut and appropriate the entire timber of the trees standing on nakdi holdings. It is clear, therefore, that "bakabje raiyat" in this entry means that the tenant is entitled to appropriate the timber and the landlord has no share in it.

[3] Mr. Jha wanted to argue that this cannot be said to be a specific entry within the meaning of the proviso inasmuch as it does not record the rights of the landlord and tenant in the timber. I, however, overrule this contention and hold that the present is a case of a specific entry in the record of rights. Village notes may not be record of rights by themselves, but they are authoritative records prepared by public servants in discharge of public duties and they certainly can be used for the purpose of interpretation of entries in the record of rights. In this view, I hold with Mr. Lalnarayan Sinha that the case is governed by the proviso. But to what effect? If the entry stands alone, it gives the entire timber to the tenants. So, reservation, if any, as against a statutory provision giving the tenants the full right to the timbers of the trees is in their favour. The appellant, however, contends that the civil Court decision, already referred to, affects the entry, his submission being not as was contended in the Court of appeal below that they were *res judicata* between the parties but that the judgments in those cases were evidence of a conclusive character as to the custom under S. 42, Evidence Act, and that thus all the entries in all nakdi holdings in the village are affected by those judgments which declare that the local custom should overrule the settlement entries. This contention no doubt carries great force but does not appear to be very convincing.

[4] A specific entry in the record of rights may owe its origin to a contract as between the parties, particularly where the record is against the local custom. Notwithstanding a local custom to the contrary, landlords and tenants as between themselves during the subsistence of the tenancy or at its inception may agree to a particular mode of enjoyment of the trees on the holding and the right to timber thereof. Every specific entry in the record of rights has a presumptive value. "Bakabje raiyat" explained in the light of the village notes gives the full right in the timber to the tenants. This entry is to be presumed to be correct till rebutted. Mere proof of local custom may or may not rebut it. In the cases in which the decisions have been arrived at, the tenant-defendants might not have set up a case of contract or arrangement as between the landlord and tenant contrary to the local custom. In this view of the matter, it cannot be said that those judgments even though they are adequate evidence of local custom do affect every specific entry in the village recorded in respect of the holdings other than the holdings in dispute in those cases. In answer to my observation to this effect in course of the argument Mr. Kailash Ray giving the reply in the absence of Mr Lalnarayan Sinha said that the tenants had not set up a contractual right in their defence. This argument is completely fallacious. The tenant relies upon S. 23A of the Act which gives him the full right. It is for the landlord to show that there is a civil Court decision which affects the holding in relation to the respective rights of the landlord and tenant over the timber of the trees standing thereon. To meet this position, the plaintiff adduced in evidence the judgments declaring the local custom. As I have already shown mere declaration of the local custom in a judgment of a suit or suits in relation to certain entries would not necessarily affect other entries which might have been based upon special contract. The tenant's case is well established when he can show that there is no civil Court decision affecting the entry in question. In this contention emphasis is laid upon the word "specific." The word "specific" is used as an epithet to the word "entry." The civil Court decision might have affected entries in general by declaring a local custom but cannot be said to affect a specific entry. The plaintiff-landlord, therefore, has failed to discharge the burden that lay upon him.

[5] Mr. Jha wanted to argue that a specific entry contemplated in the proviso must be an entry in favour of the landlord. This argument cannot hold good. At the time when the records of rights were published, the general law gave the landlords full right to the timber, and, therefore, if any entry was to be made, it was to indicate the tenant's rights, if any.

[6] In this view of the matter, I would dismiss the appeal with costs.

V.B.B. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 191** *[C. N. 71.]*

AGARWALA AG. C. J. AND MANOHAR LALL J.

*Raghunandan Singh — Defendant — Appellant* v. *Sm. Soubhagua Sundari Devi, Plaintiff and others — Defendants — Respondents.*

Letters Patent Appeal No. 22 of 1946, Decided on 15th September 1947, from judgment of Ray J., D/- 6th May 1946.

Civil P. C. (1908), S. 11—Question of title decided in two suits—Appeal in one only.

Where a question of title is decided in two cases and there is an appeal in one only, leaving the other decision unchallenged, it is not open to the Court in appeal to investigate the matter again : 20 A. I. R. 1933 Pat. 78 and 156 I. C. 998 (Pat.), *Foll.* [Para 2]

Annotation : ('44-Com.), C. P. C., S. 11, N. 29.

*Cases referred* :—

1. ('33) 12 Pat. 139 : 20 A. I. R. 1933 Pat. 78 : 141 I. C. 762, Mrs. Gertrude Oates v. Mrs. Millicent D'Silva.
2. ('35) 156 I. C. 998 (Pat.), Ramkishan Lal v. Abu Abdullah Syed Hussain Imam.

*S. C. Mazumdar and Ramanugrah Narain Sinha* — for Appellant.

*R. S. Chatterjee and S. K. Sarkar* — for Respondents.

**Agarwala Ag. C. J.**—This is an appeal under the Letters Patent by the defendant against a decision of Ray J. The facts are that the plaintiff instituted 225 suits for the rent of different holdings against the tenants of those holdings impleading the appellant in every suit as a cosharer landlord. The plaintiff claimed eight annas of the rent, alleging that he was an eight-anna cosharer in the proprietary interest. The appellant, on the other hand, denied that the plaintiff had any title to the land and alleged that he himself was the sole landlord. The first Court held in favour of the plaintiff and decreed the claim. In one of the suits only the appellant preferred an appeal, reiterating his claim to be the sole landlord. The appellate Court held that the matter was *res judicata* and dismissed the appeal. A second appeal to this Court was also dismissed.

[2] So far as this Court is concerned, the matter is concluded by the decision of two Division Benches, namely, 12 Pat. 139[1] and 156 I. C. 998,[2] where it has been held that where a question of title is decided in two cases, and there is an appeal in one only, leaving the other decision unchallenged, it is not open to the Court in appeal to investigate the matter again. This appeal must, therefore, be dismissed with costs.

**Manohar Lall J.**—I agree.

S. C. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 192 *[C. N. 72.]*

SINHA AND MUKHARJI JJ.

*Shyamsunder Kuer — Decree-holder — Appellant* v. *Mathura Prasad Sen — Judgment-debtor — Respondent.*

A. F. O. O. No. 245 of 1945, Decided on 22-8-1947, from decision of Sub-Judge, Gaya, D/- 28-3-1945.

(a) Civil P. C. (1908), O. 34, R. 14 — Decree for payment of money—Construction of decree.

Where the effective portion of a decree is as follows: "It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold," this is not a decree for the payment of money within the meaning of R. 14 of O. 34 but is in terms a decree for sale under O. 34, R. 5 (3). [Para 5a]

Annotation: ('44-Com.) Civil P. C., O. 34, R. 14, Note 6; O. 34, R. 5, Note 17.

(b) Civil P. C. (1908), S. 11—Execution proceeding—Objection to sale of certain property in execution — Execution dismissed for default of decree-holder — Objection not decided — Decree-holder, if can invoke res judicata in his favour in subsequent execution.

Where the previous objection of the judgment-debtor to the sale of certain property was dismissed without adjudication, the execution case itself being dismissed for non-prosecution, the decree-holder is not entitled in subsequent execution proceedings to invoke the aid of the rule of *res judicata* in his favour, and say that the judgment-debtor is barred from raising the same objection. [Para 6]

Annotation: ('44 Com.) Civil P. C., Ss. 11, Notes 3, 100 and 106, Note 23 Pt. 48.

(c) Civil P. C. (1908), S. 11—Execution proceedings—Decision in one execution case, if can be res judicata in execution of decree in subsequent suit.

The execution proceeding is a continuation of the suit. Hence, the decision in one execution case should be deemed to be a decision in that suit which should operate as *res judicata* in execution proceedings taken in execution of a decree in a subsequent suit, if the parties are the same and the issues are identical: 27 A.I.R. 1940 Mad. 59, *Rel. on.* [Para 7]

Annotation : ('44-Com.) Civil P. C, S. 11, Note 3, Pt. 9; Note 23.

(d) Civil P. C. (1908), S. 11—Execution proceedings—Final mortgage decree under O. 34, R. 5 (3) supersedes decree and operates as res judicata superseding former res contained in judgment of executing Court in execution of previous decree.

Where the final mortgage decree under O. 34, R. 5 (3) between the parties has specifically directed that mauza *B* or a sufficient part thereof, be sold in execution of the decree, this decision must be final between the parties as *res judicata*, superseding the former *res* contained in the judgment of the executing Court given in the previous execution case, in the previous mortgage suit on the same bond. It will be putting the same matter in a different form by saying that the executing Court cannot go behind the decree under execution, and hold that, notwithstanding the specific direction in the decree, that direction shall not be carried out by the executing Court. The decision in the second mortgage suit, which has resulted in the decree under execution, is *res judicata* between the parties. [Para 7]

Annotation: ('44-Com.) Civil P. C., S. 11 Notes 23, 36 and 37.

*Cases referred:*—

1. ('43) 22 Pat. 207 : 30 A. I. R. 1943 Pat. 282 : 208 I. C. 457, Nanekeshwar Prasad v. Nand Gopal Ram.
2. ('43) 22 Pat. 320 : 31 A. I. R. 1944 Pat. 5 : 213 I. C. 17, Umeshwar Prasad v. Dwarika Prasad.
3. ('27) 54 I. A. 68 : 50 Mad. 180 : 14 A I. R. 1927 P C. 32 : 100 I. C. 86 (P.C.), Ramarayanimgar v. Maharaja of Benkatagiri.
4. ('40) 27 A. I. R. 1940 Mad. 59 : 187 I. C. 852, Chinnappayan v. Narayana Pattar.

*Baldeva Sahay and C. P. Sinha*—for Appellant.

*Dr. D. N. Mitter and A. K. Mitter* — for Respondent.

**Sinha J.** — This is a decree-holder's appeal from the decision of the learned Subordinate Judge of Gaya, upholding the judgment-debtor's objection to the execution of the decree.

[2] The facts leading up to this appeal may shortly be stated as follows: The respondent executed a usufructuary mortgage bond on 26th Sawan 1330 Fasli, corresponding to 22nd August 1923, securing repayment of Rs. 95,000 in favour of the appellant. The mortgagor purported to deliver possession of two villages named Kuhila, including Karman Biggha, and Bhawanpur, including Alagdiha, comprised in Tauzi No. 4233 in *mahal* Kuhila as also certain *khudkasht* and *bakasht* lands contained in the schedule to the deed of mortgage. The usufruct of the mortgaged properties was fixed at Rs. 8000, out of which the mortgagee in possession was to appropriate the sum of Rs. 7125 as interest on Rs. 95,000, the principal sum secured, at the rate of 7½ per cent. per annum. The remaining sum of Rs. 875 was stipulated to be paid back to the mortgagor every year in two instalments. Two days later, two other documents were executed between the parties, namely (1) a deed of lease (called *patta katkena*), whereby the mortgagee in possession leased back to the mortgagor the mortgaged properties aforesaid on a fixed annual rent of Rs. 8000, and (2) a "mortgage security bond," mortgaging *mauza* Bhawanpur, out of the mortgaged properties, as also *mauza* Bunderkol as a security for the regular payment of the rent of the leasehold properties, and agreeing to pay interest on unpaid instalments of arrears of rent at the rate of Re. 1-9-0 per cent. per month. As usual, the mortgagor failed to pay the stipulated amount of rent to the mortgagee, with the result that a final mortgage decree was obtained on 11th January 1930, for the sum of about thirty thousand rupees in mortgage Suit No. 34 of 1927. The decree was put into execution in Execution Case No. 14 of 1930. In that execution case, the decree-holder prayed for the sale of *mauza* Bunderkol as also of *mauza* Bhawanpur. The mortgagor objected to the sale of *mauza* Bhawanpur under S. 47 read with O. 34, R. 14, Civil P. C., and contended that village Bhawanpur could not be sold. The executing Court held that the provisions of O. 34, R. 14 were a bar to the execution of the decree by sale of village Bhawanpur. It accordingly directed that *mauza* Bhawanpur should not be sold in execution of the decree. Ultimately, the other village, Bunderkol, was sold. The mortgagee obtained another decree on the mortgage security bond, which was made final on 23-11-1940, for the sum of Rs. 59,716 odd, principal with interest up to the date of execution, that is to say, about the end of 1943. In the execution petition, the decree-holder prayed for the sale of *mauza* Bhawanpur, the remaining property comprised in the mortgage security bond. In this execution case, the judgment-debtor took the same objection to the sale of *mauza* Bhawanpur as he had taken successfully in the previous execution case. The executing Court has again uphold the judgment-debtor's contention, and held that *mauza* Bhawanpur cannot be sold unless the provisions of R. 14 of O. 34 of the Code have been complied with. His reasons for such a decision are two-fold, firstly, that the usufructuary mortgage bond, the deed of lease and the mortgage security bond being all parts of the same transaction, the provision of R. 14 of O. 34 are a bar to the sale, and, secondly, that the previous decision in the execution case of 1930 was *res judicata* between the parties. Hence, this appeal by the decree-holder.

[3] Before dealing with the merits of the appeal, I may mention the fact that the paper-book as prepared originally did not contain all the relevant documents on which the decision of the appeal depended. The learned advocate for the respondent made an application under R. 27 of O. 41 of the Code for reception of additional evidence. The application sets out the documents which the respondent prayed to be admitted as additional evidence. The learned advocate for the appellant did not object to this course. As a matter of fact, he welcomed the proposal. The learned advocate for the respondents has supplied the Court with copies of those documents, which are mostly public documents, with translations where necessary. We have looked into those documents on the assumption that they are part of the records of this case.

[4] Mr. Baldeva Sahay has raised the following contentions in support of the appeal, namely, (1) that the provisions of R. 14 of O. 34 of the Code are not applicable to the facts of the present case for the reasons (a) that the decree under execution is not one for payment of money (b) nor was it in satisfaction of a claim arising under the mortgage; (2) that really the decree under execution was for sale of the mortgaged properties as comprised in the *zamanatnama* (security bond), and, therefore, the provisions of R. 12 of O. 34 of the Code could more appropriately be applied to this case; (3) that, in a previous execution in respect of the decree taken out in 1940, the judgment-debtor had taken the same objection, which he allowed to be dismissed for default, and that order of dismissal should operate as *res judicata* between the parties, and, being the later *res*, should prevail over the earlier and (4) that the order under appeal really amounts to a refusal by the executing Court to execute the decree as it stands.

[5] Mr. Mitter, appearing on behalf of the respondents, has contended, in answer to the appellant's contentions, that the three documents between the parties are really parts of the same transaction, and he has relied upon two Division Bench rulings of this Court reported in 22 Pat. 207[1] and 22 Pat. 320[2] and also upon the decision in 54 I. A. 68=50 Mad. 180.[3] He also suggested that, though the decree was in terms a decree for sale of the mortgaged properties, in substance it was a decree for payment of money, the rent reserved under the lease, which was really the usufruct of the properties mortgaged under the usufructuary mortgage bond. And, lastly, he contended that the decision in the first execution case of 1930, in which a similar objection raised by the judgment-debtor to the sale of the very same village Bhawanpur was upheld, operated as *res judicata* between the parties. Reliance was placed on the decision of a single Judge of the Madras High Court in A.I.R. 1940 Mad. 59.[4]

[5a] A good deal of argument was advanced by counsel for the parties on the question of whether the three documents between the parties were or were not parts of the same transaction. It was contended on behalf of the appellant that the *zamanatnama* could not possibly be treated as part of the first mortgage transaction for the reason that the properties in the *zamanatnama* were not identical with those given in the usufructuary mortgage; only village Bhawanpur of the properties in the usufructuary mortgage was included in the *zamanatnama* which contained the additional village Bunderkol. It was also contended that, whereas the rate of interest in the usufructuary mortgage bond was $7\frac{1}{2}$ per cent. per annum, the rate of interest in the *zamanatnama* would work out at Re. 1-9-0 per cent. per mensem. In my opinion, it is not absolutely necessary to determine this question in this appeal. The appeal, in my opinion, must be allowed on the construction of R. 14 of O. 34 of the Code, on which reliance has been placed by both the parties as determining the question in controversy between them. It is manifest that the decree under execution in terms is a decree for sale under O. 34, R. 5 (3) of the Code, the effective portion of which is as follows :

"It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold."

Hence, clearly this is not a decree for the payment of money within the meaning of R. 14 of O. 34 of the Code. Hence, the very first condition necessary for the application of the rule is wanting in this case. The question whether the decree is in satisfaction of a claim arising under the mortgage need not be discussed, in view of the position already indicated that it is not absolutely necessary to decide the question whether all the three documents form parts of the same transaction.

[6] In view of the fact that the previous objection of the judgment-debtor to the sale of *mauza* Bhawanpur was dismissed without adjudication, the execution case itself being dismissed for non-prosecution, the decree-holder is not entitled, in my opinion, to invoke the aid of the rule of *res judicata* in her favour.

[7] The only question which now remains to be determined is whether the learned Subordinate Judge is right in holding that the judgment in the previous execution case in execution of the previous decree, referred to above, is *res judicata* between the parties. It is true that the previous decree also was for sale in similar terms as the present decree under execution. Both the decrees had been passed in enforcement of the same mortgage bond called the *zamanatnama*. It was argued by Mr. Baldeva Sahay that a decision at one stage of execution proceedings is *res judicata* at a subsequent stage of the same execution proceedings ; but that decision in one execution case in execution of a previous decree cannot operate as *res judicata* in a different execution proceeding for the enforcement of a different decree, though between the same parties and raising the identical question. Ordinarily, that would be so. But, as pointed out by the single Judge of the Madras High Court, S. 11 in terms applies the rule of *res judicata* by providing that the decision in a previous suit between the same parties would operate as *res judicata* in a subsequent suit raising the same issues. He also observed that execution proceeding is a continuation of the suit. Hence, the decision in one execution case should be deemed to be a decision in that suit which should operate as *res judicata* in execution proceedings taken in execution of a decree in a subsequent suit, if the parties are the same and the issues are identical. In my opinion, the real answer to the plea of *res judicata* raised by the judgment-debtor and given effect to by the Court below is that the decision in the second mortgage suit, which has resulted in the decree under execution, is *res judicata* between the parties. The mortgage suit was contested by the mortgagor : either he raised the contention now raised in the execution proceedings or he did not. In either view of the matter, the decision is *res judicata*. The decree has specifically directed the sale of *mauza* Bhawanpur, which is the only property now remaining out of the properties comprised in the *zamanatnama*. When the final mortgage decree between the parties has specifically directed that *mauza* Bhawanpur, or a sufficient part thereof, be sold in execution of the decree, this decision must be

final between the parties as *res judicata*, superseding the former *res* contained in the judgment of the executing Court given in the execution case of 1930. It will be putting the same matter in a different form by saying that the executing Court cannot go behind the decree under execution, and hold that, notwithstanding the specific direction in the decree, that direction shall not be carried out by the executing Court. Such a contention is absurd on the face of it. As a result of these considerations, it must be held that the orders passed by the Court below cannot be sustained. The appeal is accordingly allowed, and the execution directed to proceed in accordance with law. The appellant is entitled to her costs in this Court and in the Court below.

**Mukharji J.**— I agree.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 195** *[C. N. 73.]*

SINHA AND BENNETT JJ.

*Bhubaneshwar Prasad Narain Sinha* — *Appellant* v. *Rajeshwar Prasad Narain Sinha and others* — *Respondents.*

Misc. Appeals Nos. 8 and 13 of 1947, Decided on 17th March 1947, from order of Sub-Judge, First Court, Muzaffarpur, D/- 7th January 1947 and 10th January 1947, respectively.

**(a) Civil P. C. (1908), O. 40, R. 1 — Grounds for appointment of receiver—Ouster from enjoyment of joint family properties—Managing member resisting attempt of other member to take forcible possession.**

Where one member who is in possession of the entire joint family properties on his own behalf and on behalf of the other members in his capacity of managing member resists the attempt of another member to take forcible possession of some of the properties, his conduct does not amount to an ouster of the other members of the family and cannot be a ground for the appointment of a receiver in the suit for partition instituted by the other member : 14 C. W. N. 248 and 16 A.I.R. 1929 Lah. 497, *Disting.* [Para 5]

**Annotation :** ('44-Com.) C. P. C., O. 40, R. 1, N. 75, Pt. 7.

**(b) Civil P. C. (1908), O. 40, R. 1 — Principles regarding appointment of receiver in partition suit between members of joint Hindu family stated.**

In a partition suit between the members of a joint Hindu family the Court will not appoint a receiver except by consent and especially where the family property consists of land unless special circumstances such as waste or mismanagement or fraudulent acts on the part of the defendant are proved. Where however the relations between the parties have become so embittered that they do not trust each other and the conduct of the defendant after the institution of the suit gives sufficient justification to the plaintiff to urge that he has no confidence in the honesty and integrity of the defendant, the Court while not putting the defendant out of possession of the properties will appoint some other person as joint receiver with the defendant in order to safeguard the interest of other members: 7 A.I.R. 1920 Bom. 321; 22 A.I.R. 1935 Mad. 402 and 10 A. I. R. 1923 Lah. 48, *Rel on.* [Paras 6 and 7]

**Annotation :** ('44-Com.) C. P. C., O. 40, R. 1, N. 13, Pts. 8 and 13 ; N. 15, Pts. 2, 4 and 6.

*Cases referred :*—

1. ('10) 14 C. W. N. 248 : 5 I. C. 96, Ramji Ram v. Saligram.
2. ('29) 16 A. I. R. 1929 Lah. 497 : 117 I. C. 375, Basant Ram v. Dasondhi Mal.
3. ('14) 18 C. W. N. 533: 1 A. I. R. 1914 Cal. 439 : 22 I. C. 601, Suprasanna Roy v. Upendra Narayan.
4. ('20) 7 A. I. R. 1920 Bom. 321: 55 I.C. 827, Govind Narain v. Vallabhrao Narayan Rao.
5. ('35) 22 A. I. R. 1935 Mad. 402 : 156 I. C. 229, Krishnan v. Nani Maruvalamma.
6. ('23) 10 A. I. R. 1923 Lah. 48 : 72 I. C. 569, Firm Raghbir Singh Jaswant Singh v. Narinjan Singh.

*Mahabir Prasad, B. C. De and Pitamber Misra* — for Appellant.

*L. K. Jha, B. N. Rai, R. Chaudhury, B. K. Sharma, P. Jha and Shreenath Singh* — for Respondents.

**Sinha J.**—These two appeals arise out of two orders passed by the learned Subordinate Judge of Muzaffarpur in a suit for partition, (1) dated 7th January 1947, allowing the plaintiffs' application for the appointment of a receiver of the properties sought to be partitioned and (2) dated 10th January 1947, appointing a pleader of his Court as the receiver. Defendant 1 is the appellant in each case.

[2] The facts leading up to these appeals may shortly be stated as follows : From the plaint it appears that the material allegations are that plaintiff 1, Rajeshwar Prasad Narain Sinha, defendant 1, Bhubaneshwar Prasad Narain Sinha, defendant 2, Rai Bahadur Maheshwar Prasad Narain Sinha, and Sir Chandreshwar Prasad Narain Sinha (not a party to the suit) are four brothers, and that the last named has passed out of the family as a result of his adoption in duttak form. The three brothers, namely, plaintiff 1 and the first two defendants, constituted a joint Hindu Mitakshara family. After their father's death in 1918, defendant 2 acted as karta of the joint family. But from November 1935, defendant 1 has been managing the affairs of the joint family under a power of attorney executed in his favour by plaintiff 1 and defendant 2. The plaintiffs also alleged that, for some time past, feelings amongst the brothers have been "anything but desirable," and that the plaintiffs suspected foul play on the part of defendant 1. In para. 5 of the plaint, there is a vague allegation about defendant 1 having exercised undue influence upon defendant 2, and, as a result thereof, created certain transactions in respect of the joint family properties, which were "fraudulent, inoperative, void and illegal" and "never seriously given effect to." It was said during the arguments on behalf of the appellant that these vague allegations in the plaint were really directed to the transaction whereby defen-

dant 2, by virtue of a registered deed. dated 2nd December 1944, took a certain portion of the properties as his one-third share, and separated from the rest of the family. It was further alleged on behalf of defendant 1 that plaintiff 1 and defendant 2 are in collusion and dishonestly are making attempts to get rid of that transaction. Nothing more need be said at this stage of the litigation as to the truth or otherwise of these counter allegations of fraud and dishonesty. On the statements in the plaint, it is clear that the feelings between plaintiff 1 and defendant 2 on the one hand and defendant 1 on the other are very strained, as will appear presently from the course events took on the eve of the institution of the suit for partition as also soon after the institution of the suit on 12th November 1946, and the application by the plaintiffs for the appointment of a receiver on 13th December 1946. It is also clear that, since after the execution of the general power of attorney aforesaid in favour of defendant 1, he has been the managing member of the family, though not the eldest amongst the brothers. His power of management on behalf of all the brothers continued until the transaction aforesaid of 2nd December 1944, and after the alleged separation of defendant 2 from the rest of the family at that time until 1st June 1946, when plaintiff 1 got a notice published in the "Indian Nation" to the effect that he had withdrawn his power of attorney from defendant 1. On 6th August 1946, plaintiff 1, after having withdrawn the power of attorney from defendant 1, gave a general power of attorney to defendant 2. It appears further that defendant 2, being armed with a power in his favour from plaintiff 1 made an attempt forcibly to occupy certain portions of the residential houses in Birsinghpur, which is the headquarters of the family. The result was a proceeding under S. 144, Criminal P. C., drawn up by the Sub-Divisional Magistrate in order to maintain peace. We were informed that the proceedings ended in favour of defendant 1 in so far as certain restraint orders were passed against defendant 2 at the end of October 1946. After the filing of the suit for partition on 12th November 1946, on the same day an application was filed on behalf of the plaintiffs supported by an affidavit, praying for the issue of a commission for making a complete inventory of the movables of the estate. as it was apprehended that defendant 1, on coming to know of the institution of the suit, was making arrangements for their removal. The Court directed notice of the application to be issued to the effect that the Court had appointed two commissioners to make an inventory of the movables on the plaintiffs' application, and that the defendant should give facilities to the commissioners in preparing the inventory. The notices were sent per special peon, and the preparation of the inventory began immediately. As defendant 1 was reported to be creating difficulties in the way of the commissioners, police help was requisitioned; but, on 16th November he appeared before the commissioners and informed them that he had no objection to the inventory being made, and that his servants, during his absence, had made objections to the entry of the commissioners into the inner apartments of the houses occupied by defendant 1 and his family. The making of the inventory was completed, and a report submitted to the Court on 18th November and on 20th November, defendant 1's explanation to the Court, on being called upon by it to show cause why he should not be dealt with for disobedience of the Court's orders, was accepted. It appears that defendant 1 took umbrage at the attempt made by plaintiff 1 and defendant 2 in having a complete inventory made of the movables. It goes without saying that the family is a very respectable one, and it appears that defendant 1 thought that the prestige of the family had been lowered and his position compromised by having court officers and court peons, more or less, to search for movables and things said to have been concealed by, or at the instance of, defendant 1. One may sympathise with the feelings of defendant 1 in the predicament in which he found himself; but, all the same, the Court could not look upon his attempt, or the attempts made by his servants, to thwart the execution of the process of the Court. Fortunately for defendant 1, he was brought to a more reasonable frame of mind, and he informed the Court that he had no intention of disobeying the orders of the Court. One thing is absolutely clear that these happenings have all the more embittered the feelings between the brothers, and we reserved judgment only with a view to giving the parties sufficient time to make up their differences by making a reference of all their disputes to the arbitration of some respectable and responsible persons suggested by counsel for the parties, who have done their very best to bring about a happy and speedy conclusion of this very unhappy quarrel between members of a respectable family. But all their efforts have proved in vain, and the Court was informed only on 10th March that the suggestions for a compromise made by the Court and the efforts of counsel for the parties had proved unavailing. Hence, it is necessary to decide the question whether it is a fit case in which a receiver should be appointed and a stranger to the family placed in possession of the family properties, including zamindari interests and extensive culturable zerait and bakasht lands,

said to be about 700 bighas in area. The Court below by the two orders appealed against has decided that it is a fit case in which a receiver should be appointed, and that none of the parties to this litigation should be the sole receiver, or one of the receivers, to be appointed by the Court.

[3] In the plaint, the plaintiffs claimed partition of their one-third share of the family assets, a list of which was given in the schedules attached to the plaint. There is also a claim for rendition of accounts from defendant 1. The cause of action for the suit was alleged to have arisen on 9-9-1946, when the last demand for partition was refused. In the plaint, there are no specific allegations of waste or danger to the family assets or that the plaintiffs had been excluded from the enjoyment of the joint family assets. In the application made on 13-12-1946, for the appointment of a receiver, absolutely vague allegations of misappropriation, mismanagement and waste have been made, but no particulars given. It was also stated that in the course of the criminal proceedings under S. 144, Criminal P. C., referred to above, defendant 1 claimed exclusive possession over all the properties appertaining to the estate of the family It was further stated that there are large areas of kasht and bakasht lands in khas cultivation, out of which about 200 bighas were under sugarcane and some area under chilli cultivation. Finally, it was asserted that a substantial portion of valuable bakasht lands had been nominally settled by defendant 1 in the name of his creatures, and that a large number of valuable trees had been cut down and sold away. These allegations have not been sought to be proved in the Court below and the learned Subordinate Judge has not recorded any finding that even a *prima facie* case had been made out so far as the allegations as regards waste and mismanagement made in the petition are concerned. Defendant 1, in answer to the plaintiffs' application for appointment of a receiver, specifically denied that he had done any acts which could be said to amount to waste or mismanagement. As regards the allegations that bakasht lands had been settled, as alleged by the plaintiffs, dishonestly and collusively, defendant 1 characterised them as "mischievous lies." It was further alleged by defendant 1 that hooliganism had been started at Birsinghpur at the instance of the plaintiff and defendant 2, with the result that criminal cases cropped up, and proceedings under S. 144, Criminal P. C., were instituted, as a result of which the plaintiff and defendant 2 and their supporters were restrained from doing such acts as would lead to the breach of the peace. Defendant 1 also claimed that he had been managing the estate and carrying on cultivation on a large scale in a scientific manner. He denied the suggestion that he was claiming exclusive possession in the sense that the plaintiffs had been ousted. He admitted the plaintiffs' claim for partition, and stated that the plaintiffs had already started separate collection of rent from the tenants. He further stated that whatever sugarcane had been grown will be cut and supplied to the sugar mills, a proper account of which will be maintained in the usual course of business. He claimed that he was in possession of the entire family assets as the managing member, and that his possession should not be interfered with during the pendency of the suit. He gave an estimate of the produce of paddy and chillies, which, on the face of it, is a gross under-statement. He further alleged that most of the paddy had been looted by the men of the plaintiffs and defendant 2. He ended by submitting that this was not a fit case for appointment of a receiver, and that, if the Court came to the conclusion that there should be a receiver, he should be appointed such a receiver.

[4] This case has to be determined on the footing that there is no specific allegation of waste or mismanagement on the part of defendant 1, and that no *prima facie* case has been made out in support of the vague allegations in the plaint, or in the application for appointment of a receiver, that defendant 1 has been guilty, or may reasonably be suspected, of having committed acts of waste or mismanagement or any fraudulent acts which would justify the order for the appointment of a receiver. As already indicated, the lower Court also has not recorded any such finding. We have heard counsel at great length on behalf of all the parties concerned, and we have come to the conclusion that there is no justification in the record for making any aspersions against the conduct of defendant 1 in relation to his management of the properties until the date of the institution of the suit. It is also clear that defendant 2 has been instrumental in embittering the feelings between the parties all the more as a result of his ill-advised move to take forcible possession of such portions of the family properties and houses as he would like to do in assertion, however *bona fide*, of the plaintiffs' right, or of his own right, to those properties. His ill-advised acts aforesaid led to the public authorities deputing a military force to preserve public peace and to give protection to defendant 1 who was apprehensive of danger to his life and property. For creating such a situation, the plaintiffs and defendant 2 have to thank themselves. Defendant 1 was acting all the time in defence of himself and his property, and, naturally, the public authorities had to give

him such protection as the law entitled him to. But it cannot be said that for all these incidents defendant 1 is responsible or that they justify his being put out of possession by the appointment of a receiver. If those were the only grounds on which the plaintiffs prayed for the appointment of a receiver, I would have no hesitation in rejecting the prayer.

[5] But there was another ground which was sought to be made out by the plaintiffs for the appointment of a receiver, namely, that they had been ousted from the enjoyment of the joint properties. The Court below seems to have proceeded on this basis in making the order for the appointment of a receiver. In my opinion, there is no sufficient foundation for such a contention. Defendant 1 has frankly conceded that the plaintiffs are entitled to their share in the family estate, that he had been managing the properties on their behalf as well, and that he had no intention, past or present, of depriving the plaintiffs of their due share in the joint family assets. Mr. L. K. Jha was at pains to point out on behalf of the plaintiffs that defendant 1, by his conduct during the criminal cases aforesaid, has shown that he was claiming exclusive right to possession over the properties, particularly the residential houses of the family. But in my opinion, the stand taken by defendant 1 is neither unjust nor in defiance of law. He was admittedly in possession of the entire joint family properties on his own behalf and on behalf of the other members in his capacity of the managing member. Mr. Jha made some attempt to show that he was not in possession in that capacity, and that he was only in possession as an agent by virtue of the general power of attorney. But this is only an attempt unsuccessful as it is to go back on the allegations in the plaint itself. In the plaint, it is admitted that defendant 1 was the managing member of the family. But defendant 1 has never taken the position which either in fact or in law can be said to amount to an ouster of the other members of the family. He was objecting to, and seriously resisting, the attack of defendant 2 upon the property in his attempt to dispossess defendant 1. So long as the property is joint, all the members of the coparcenary are entitled to peaceful possession of every part of the joint property; but no member is entitled to use force with a view to taking exclusive possession of any portion of these properties. Hence if defendant 1 resisted the attempt of defendant 2 on his own behalf, or on behalf of the plaintiffs, to take forcible possession of some portions of the residential houses, he was doing nothing wrong. Hence, in my opinion, it cannot be said that defendant 1, by his conduct during the course of the criminal proceedings, has deprived himself of the right to be in possession of the joint family properties. It has not been alleged by the plaintiffs that they ever made any demand on defendant 1 for funds to maintain themselves and their family out of the family assets. Hence, there was no occasion for defendant 1 to accede to such a request. If it had been alleged and substantiated by the plaintiffs that they made any demand for funds from the leading member of the family, which were unreasonably refused, there may have been good reasons for holding that the plaintiffs had made out a case for appointment of a receiver. Hence, the decision of the Calcutta High Court in 14 C. W. N. 248[1] that in a suit for partition of joint family properties, when it was proved that an admitted cosharer in the properties was being kept out of possession and all supplies cut off from him, a receiver should be appointed, does not apply to the facts and circumstances of the present case. For the same reasons, the decision of a single Judge of the Lahore High Court in A. I. R. 1929 Lah. 497[2] cannot be prayed in aid of the respondents in this case.

[6] On the other hand, Mr. Mahabir Prasad appearing on behalf of the appellant contended on the authority of the decision of Bench of the Calcutta High Court in 18 C. W. N. 533,[3] of the Bombay High Court in A. I. R. 1920 Bom. 321,[4] of the Madras High Court in A. I. R. 1935 Mad. 402[5] and of the Lahore High Court in A. I. R. 1923 Lah. 48[6] that the present case is not a fit one for the appointment of a receiver, inasmuch as the allegations of waste and mismanagement and fraudulent dealings have not been made out, as held by the Court below. The Bombay High Court in the decision referred to above has ruled that, generelly speaking, in a partition suit between the members of a joint family the Court will not appoint a receiver except by consent and especially where the family property consists of land. In such a case, special circumstances have got to be proved in order to obtain an order for the appointment of a receiver; for example, where the Court is satisfied that the property in possession of the opposite party was in danger of being wasted. Those observations have been approved by Beasley C. J. in A. I. R. 1935 Mad. 402[5] referred to above. To the same effect are the observations of Campbell J. in the decision of the Lahore High Court reported in A.I.R. 1923 Lah. 48.[6] In my opinion, the decisions referred to above proceed on sound principles relating to the appointment of a receiver in a suit for partition of joint family properties.

[7] During the course of the argument in this case, it became absolutely clear that the parties do not attach much importance to the manage-

ment of the *zamindari* property, that is to say, the right to collect rents from tenants, as distinguished from the right to cultivate the *kasht* and *bakasht* lands which are said to be about 700 bighas in area. We, therefore, suggested to plaintiff 1 and the appellant through their respective advocates that they might come to some interim arrangement as regards the division of the *kasht* and *bakasht* lands which they should cultivate separately pending the decision of the suit itself. We were prepared to ignore the existence of defendant 2 so far as these lands were concerned, as we had no materials before us to lead to the conclusion that the arrangement whereby he separated from the rest of the family could be successfully attacked. But, as indicated above, counsel for the parties expressed their disappointment at not having been able to bring their respective clients to agree to those suggestions. It is also clear that defendant 1, who has been in possession of those lands by *khas* cultivation, is now interested in minimising as much as he could the usufruct of those lands, and similarly the plaintiffs are interested in exaggerating the produce of those lands and alleging that the appellant is misappropriating the produce. It is also clear that the relations between the parties have become so embittered that they are not in a frame of mind to trust each other. The conduct of defendant 1, the appellant, during the preparation of the inventory by the commissioners appointed by the Court showed that he was inclined to secrete property in which all the joint members are interested. Hence, while deciding that the defendant-appellant should not be put out of possession of the properties which he has been managing so far ever since 1935 as aforesaid, I have come to the conclusion that we must make sufficient provision for safeguarding the interest of the other parties to this dispute, particularly that of the plaintiffs. If the defendant's conduct had been absolutely straightforward and above board throughout, I would have no hesitation in allowing the appeal and setting aside the order of the Court below appointing a receiver; but defendant 1, by his conduct aforesaid, has forfeited that confidence to which he was entitled by virtue of his conduct before the institution of the suit. But his conduct soon after the institution of the suit has given sufficient justification to the plaintiffs to urge that they have no more any confidence in the honesty and integrity of defendant 1. In view of these considerations, I would hold that defendant 1 and the Pleader appointed by the Court below should be appointed joint receivers of the property. Defendant 1 will continue in possession and have the cultivation done; but the Pleader appointed by the Court below as a receiver will be jointly responsible with him for the management of the property and for keeping correct and proper accounts of the incomings and outgoings of the whole estate, including the *kasht* and *bakasht* lands. As nothing has been said about the remuneration of the Pleader appointed by the Court below as a receiver, the orders of the Court below will stand in those respects. I would have been inclined to appoint plaintiff 1 and defendant 1 as the joint receivers, if the feelings between them were not so bitter as they appear to have been recently. In this connection I may cite the instance of the case in 18 C.W.N. 533[3] decided by a Division Bench of the Calcutta High Court consisting of Mookerjee and Beachcroft JJ. who held in circumstances very similar to the present that a party to the litigation may be appointed a receiver in special circumstances. As directed in that case, the share of defendant 1 in the joint estate will remain as security for the due performance of his duties as one of the two joint receivers. The question of security in respect of the Pleader receiver need not be reopened here, and the orders passed by the Court below in that respect will stand. Of course, it will be open to the parties to apply to the Court below for such orders as it thinks fit and proper for payment to the respective families of such amounts by way of maintenance and other expenses as the Court below may direct. The two receivers will be under the control and direction of the Court below which will deal with them as if they had been appointed by that Court.

[8] In the result, the appeals are partly allowed, and the orders of the Court below modified to that extent. There will be no order as to costs either in this Court or in the Court below in the matter of the appointment of receiver.

**Bennett J.** — I agree.

D.H. *Appeals partly allowed.*

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**A. I. R. (35) 1948 Patna 199** *[C. N. 74.]*

AGARWALA AG. C. J. AND MANOHAR LALL J.

*Mt. Prem Kuer—Appellant* v. *Ram Lagan Rai and others—Respondents.*

Letters Patent Appeals Nos. 24 and 25 of 1946 Decided on 19-9-1947, from judgment of Reuben J. D/- 26-3-1946.

**(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 167 —Holding charged for maintenance — Rent decree — Holding sold and purchased by landlord himself—No formal annulment necessary.**

Where a holding on which a charge for maintenance is created by a decree is sold in execution of a rent decree and purchased by the landlord himself, there is nothing to prevent him from ignoring the charge without formally annulling the encumbrance under

S. 167. The charge-holder cannot sell such a holding in execut on of his maintenance decree for subsequent arrears : 26 A. I. R. 1939 Pat. 339 (F.B.) and 16 A.I.R. 1929 Pat. 222. *Rel. on.* [Para 5]

(b) Transfer of Property Act (1882), S. 100 — Charge created by decree not one under S. 100.

A charge created by the decree of a Court is neither a charge created by act of persons or created by operation of law. Such charge does not, therefore, fall under S. 100 : 32 A. I. R. 1945 Pat. 278, *Foll.* [Para 6]

Annotation :—('45 Com.) T. P. Act, S. 100, N. 28.

(c) Civil P. C (1908), O. 21, R. 58 — Arrears of and future maintenance created charge on certain property by d cree Sale of property in execution— Subsequent execution on further default, against same property — Maintainability.

In a suit for past and future maintenance, a decree was passed by which arrears of and future maintenance were declared a charge on certain properties. In execution of the decree the properties were sold. Future maintenance fell due and the decree-holder sought to execute the decree by sale of the same properties:

*Held*, that the properties were sold subject to the right of the decree-hol er to sell the properties. The decree for maintenance was in the nature of a composite decree, which was not one single decree, but comprised as many decrees for payment and realisation by sale of the properties charged as there were defaults. Hence, the properties continued to remain forever charged with the maintenance decree, and the transferee could not object to their sale. [Paras 9, 10]

Annotation : — ('44-Com.) C. P. C., O. 21, R. 58, N. 18.

*Cases referred* :—

1. ('39) 18 Pat. 676 : 26 A. I. R. 1939 Pat. 339 : 182 I. C. 678 : 40 Cr. L. J. 687 (F. B.), Mahadev Maharaj v. Jagdev Singh.
2. ('28) 7 Pat. 155 : 15 A. I. R. 1928 Pat. 234 : 107 I. C. 310, Badlu Pathak v. Sibram Singh.
3. ('29) 8 Pat 439 : 16 A. I. R. 1929 Pat 222 : 116 I. C 518, Sourendra Mohan Singh v. Kunj Behari Lal.
4. ('45) 24 Pat. 245 : 32 A. I. R. 1945 Pat. 278 : 220 I. C. 75, Deben Iranath v. Trinayani Dasi.

*Dasu Sinha* — for Appellant.

*S. K. Mitra and R. S. Sinha* — for Respondents.

**Manohar Lall J.**—These two Letters Patent appeals are from the decision of Reuben J., who dismissed the appeals of the appellants in the following circumstances.

[2] The appellant Mt. Prem Kuer obtained a decree for past and future maintenance on 9-1-1928, against her mother-in-law, Mt. Rambarat Kuer. By this decree arrears of and future maintenance were declared a charge on the properties which have been styled as lots 1, 2 and 3 in these proc edings. The defendant, Mt. Rambarat Kuer, preferred an appeal against the decision in Title Suit NO. 30 of 1926. The appeal was dismissed on 21-12-1928. But during the pendency of the appeal, the landlord of the raiyati holding, Lot NO. 1, instituted a suit for recovery of arrears of rent, obtained a decree and in execution thereof purchased Lot NO. 1 on 24-5-1928 and obtained delivery of possession on 17-11-1928 and thereafter transferred Lot NO. 1 for consideration to the respondents in one of the appeals whom I shall hereinafter describe as the transferees.

[3] The appellant executed her maintenance decree on 25-5-1929, against lots 2 and 3, and as the result of an auction sale these two lots were sold to the same landlords who transferred these lots to the respondents transferees, and the decree was satisfied. Future maintenance fell due and the decree holder again put the decree in execution seeking to sell lots 1, 2 and 3 in the year 1941 in Execution Case NO. 75. Two objections were preferred by the landlords under S. 47 and by the transferees under O. 21, R. 58, Civil P. C., that the three lots could not be sold in execution firstly because the charge created by the decree was a charge for the realisation of the arrears of maintenance up to the date of the decree and not for future maintenance, secondly that Lot NO. 1 having been sold in execution of a rent decree of the landlords could not be again sold in the present execution, and thirdly, that the landlords and the transferees are *bona fide* purchasers of value without notice of the charge of the maintenance decree-holder, assuming that such a charge has been validly created.

[4] Reuben J., in disagreement with the Courts below has come to the conclusion that the decree in Title Suit NO. 30 of 1926 created a charge for future maintenance only, and this finding has not been challenged before us. All the Courts have found that the landlords and the transferees respondents are *bona fide* purchasers for value without notice, and, therefore, the charge created by the decree is not binding upon them. Hence these two Letters Patent appeals.

[5] Mr. Dasu Sinha appearing for the maintenance decree-holder argues that the decree in which Lot NO. 1 was purchased by the landlord was not a rent decree but merely a decree for money. Reuben J., however, has shown that the decree was a decree for rent, and further this identical question has been decided adversely to the appellant in a suit instituted by her for a declaration that this rent decree and the sale held thereunder were not binding upon her. It was then argued that the landlord auction-purchaser should have annulled the encumbrance under S. 167, Bihar Tenancy Act, within one year of the date of the knowledge, and reliance was placed upon the Full Bench decision in 18 Pat. 676.[1] But that decision is against this contention because I find it clearly stated in the judgment that

"if the holding is sold in execution of a rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without formally annulling the encumbrance under S. 167,

Ben. Ten. Act of 1885. This was very clearly pointed out by Dawson Millar C. J. in 7 Pat. 155.[2]

The same view was reiterated by Sir Jwala Prasad in 8 Pat. 489.[3] I, therefore, overrule the first contention and would hold in agreement with Reuben J., that the appellant cannot be allowed to sell Lot No. 1 in execution of the maintenance decree for subsequent arrears.

[6] Regarding lots 2 and 3, the argument of Mr. Dasu Sinha is that the provisions of S. 100, T. P. Act, have no application inasmuch as the charge created by a decree of the Court is not a charge created by operation of law or by act of persons and, therefore he contends that the finding that the landlord and the transferee purchased these two lots *bona fide* without notice of the charge is immaterial. In support of his contention he relies upon 24 Pat. 245[4] where a Division Bench of this Court pointed out that a charge created by the decree of a Court is neither a charge created by act of persons or created by operation of law. This argument is well founded and must prevail.

[7] The learned Government Advocate drew attention to the order-sheet of the executing Court by which Lot No. 2 was sold for Rs. 345 and Lot No. 3 for Rs. 3000 to Ram Anugraha Narain Singh, the respondent, and to Order No. 10 dated 14-6-1929, that the appellant decree-holder put in a petition in which she prayed that out of the purchase money of Rs. 3345 she may be allowed to withdraw her decretal dues together with her maintenance up to baisakh 1336 fasli and after deducting the amount of court-fee due to the Government

"the balance may be kept in deposit in the custody of the Court for regular payment of her maintenance allowance and the judgment debtor be restrained from withdrawing the surplus sale proceeds."

He, therefore, argues that the appellant has herself treated that her maintenance decree in future must operate on the balance of the money into which these lots have been converted by the execution sale and, therefore, she cannot follow the properties by executing the decree. This plausible argument completely loses sight of the subsequent orders of the executing Court which make it clear that on the objection of the judgment-debtor the claim of the decree-holder that the surplus amount may be kept in deposit in Court was rejected by Order No. 17 dated 16-7-1929 and Order No. 23 dated 4-9-1929. The earlier argument of the learned Government Advocate would have been of some assistance to him if reliance could be placed on S 39, T. P. Act but that section cannot be applied in the present case where the right of maintenance of the appellant is no longer an indefinite right but has now been created a charge by a decree of the Court.

[8] The position, therefore, is that the transferee respondents have purchased lots 2 and 3 during the pendency of a litigation in which the right of the appellant to have her decree declared a charge on lots 2 and 3 was being prosecuted and S. 100, T. P. Act, not being applicable the transferees have purchased the properties subject to the right of the decree-holder to sell lots 2 and 3.

[9] The learned Government Advocate contended that in view of the finding that the purchasers had no notice of the charge, and the maintenance decree having been fully satisfied in the execution case started for the levy of the then decretal amount, no further charge can exist in law on these two properties. In my opinion, this argument is without any substance because even though the Courts have found that the transferees had no notice of the charge and the maintenance decree, the auction purchaser, be he the landlord or the transferee, must be deemed to have constructive notice of the charge when they purchased in the execution of the very decree which has now been held to amount to a charge decree for future maintenance also—it cannot be successfully urged that the auction-purchaser had no notice of the decree. Again it may be possible to take the view that every time the decree-holder is proceeding by way of execution, it is a fresh decree that is being put into execution, that is to say, it is a decree for maintenance, creating a charge on a certain property of the judgment-debtor and entitling the decree-holder to realise the same by taking out execution, without the necessity for fresh suits after every default in the payment of the decree, and is in the nature of a composite decree which is not one single decree, but comprises as many decrees for payment and realisation by sale of the properties charged as there are defaults — I am quoting from p. 248 of 24 Pat. 245.[4]

[10] In whatever way the matter is looked at, it seems to me that there is no escape from the conclusion that Lots Nos. 2 and 3 continue to remain for ever charged with the maintenance decree, and the transferee respondents cannot object to the sale of these two lots.

[11] The result is that the appeals must be allowed in part and it must be held that the appellant is entitled to sell lots 2 and 3, but the judgment of Reuben J., is affirmed with regard to the non-saleability of Lot No. 1. The appellant is entitled to her costs from the transferees respondents in the two appeals of lots 2 and 3. Parties will bear their own costs as between the landlords and the transferees of Lot No. 1 and the appellant.

**Agarwala Ag. C. J.**—I agree.

S. C. *Appeals partly allowed.*

**A. I. R. (35) 1948 Patna 202** *[C. N. 75.]*

MANOHAR LALL AND RAMASWAMI JJ.

*Sm. Jaduprava Mitra and another* — *Defendants* — *Appellants* **v.** *Rai Bato Behari and others, Plaintiffs and others, Defendants* —*Respondents.*

A. F. A. D. No. 1865 of 1945, Decided on 29th August 1947, from decision of Addl. Sub-Judge, First Court, Gaya, D/- 7th September 1945.

**(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 22 (2) —'Shall be deemed to be a raiyat'—Meaning.**

The phrase 'shall be deemed to be a raiyat' in S. 22 (2) should not be construed as 'shall be deemed to be a raiyat vis-a-vis the purchasing co-proprietor but not vis-a-vis the remaining co-proprietors.' Such a construction is unreasonable and not in accordance with the policy and the object of the Act. [Para 7]

A person who takes a settlement from the purchasing cosharer becomes raiyat under the whole body of landlords provided the settlement is made *bona fide* : *Case law discussed.* [Para 11]

**(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 22 (2) —Object of.**

The object of the Legislature in enacting S. 22 (2) was to prevent the accrual of occupancy right in land in possession of proprietors and co-proprietors. It was based on the maxim "*nemo potest esse tenens et dominus.*" It was obviously intended that the purchasing cosharer should not himself acquire an occupancy right or by sub-letting bar the acquisition of raiyati rights by sub-lessees. [Para 7]

**(c) Bihar Tenancy Act (8 [VIII] of 1885), S. 22 (2) —Applicability to sub-letting portion of land purchased.**

Section 22 (2) applies only if the purchasing co-proprietor sub lets the entire land to a third person, who will then be deemed to be a raiyat in respect of it. The language of neither S. 22 (2) nor its illustration warrants the view that the purchasing proprietor could split the holding into fractions and by separate subleases create smaller holdings. [Para 12]

*Cases referred* :—

1. ('27) 6 Pat. 134 : 13 A. I. R. 1926 Pat. 580: 97 I. C. 68, Kirtya Nand Sinha v. Ram Lal.
2. ('40) 27 A. I. R. 1940 Pat 467 : 19 Pat. 893 : 189 I. C. 500 (F.B.), Sunder Mall v. Lachmi Tewari.
3. ('26) 7 P. L. T. 170 : 13 A. I. R. 1926 Pat. 263 : 5 Pat 281: 93 I.C. 1001, Jhapsi Sao v. Mt. Bibi Aliman.
4. ('22) 3 P. L. T. 13 : 9 A. I. R. 1922 Pat. 193 : 65 I. C. 586, Nandkishore Singh v. Mathura Sahu.
5. ('22) 3 Pat. 22 : 9 A. I. R. 1922 Pat. 62 : 65 I. C. 281, Basudeo Narain v. Radha Kishan.
6. ('26) 7 P. L. T. 87 : 12 A. I. R. 1925 Pat. 547 : 89 I.C. 232, Lala Bambahadur Lal v. Mt. Gungora Kuar.
7. ('19) 4 Pat. L. J. 540 : 6 A. I. R. 1919 Pat. 398 : 53 I. C. 110, Emamuddin v. Mahomed Rashidul Huq.
8. ('27) 8 P. L. T 69 : 14 A. I R. 1927 Pat. 172 : 102 I. C. 386, Gopi Singh v. Jagdeo Singh.
9. ('44) 23 Pat. 291 : 31 A. I. R. 1944 Pat. 313 : 219 I. C. 207, Anand Prasad Singh v. Medni Prasad Singh.
10. ('37) 18 P. L. T. 700 : 24 A. I. R. 1937 Pat. 506 : 16 Pat 500, Miss G. B. Solanoo v. Umeshwari Kuer.
11. ('30) 4 I. T. C. 312 : 17 A. I. R. 1930 P. C. 54 : 54 Bom. 216 : 57 I.A. 49:121 I.C. 532 (P.C.), Commr. of Income tax, Bombay v. Bombay Trust Corporation, Ltd.

*J. C. Brahma*—for Appellants.

*P. K. Bose*—for Respondents.

**Ramaswami J.**—The decision of this appeal involves the proper construction of S. 22, sub-s. (2), Bihar Tenancy Act. In the suit out of which this appeal arises the plaintiffs claimed produce rent with respect to 16.77 acres of land, khata No. 12, situated in village Sidhna. The plaintiffs stated that they held eight annas share of the milkiat and defendants 1 to 8 held the remaining share. Defendants 1 to 3, 11 and 12 contested the suit. They alleged that defendants 1 to 8, cosharer proprietors, had purchased the holding in execution of a rent decree against defendant 12, Mt. Kulawanti Kuer, the original tenant. After the purchase defendants 1 to 8 settled 9.27 acres with defendants 10 and 11. The latter further urged that the plaintiffs were not entitled to realise rent from them, that they had already divided the produce with defendants 1 to 8. The learned Munsif held that the plaintiffs were not entitled to any relief against defendants 10 and 11. He granted the plaintiffs a money decree against defendants 1 to 8. The Subordinate Judge affirmed the decree of the Munsif.

[2] Defendants 1 and 3 have instituted the present appeal. On their behalf it was argued before us that the lower Courts had erroneously decreed the suit in full against defendants 1 to 8. It was contended that defendants 10 and 11 who had taken settlement from defendants 1 to 8 should under the statute be deemed to be tenants of the entire body of landlords. It was pointed out that defendants 10 and 11 were previously settled raiyats of the village and so became occupancy raiyats as soon as settlement was concluded. It was urged that the suit should have been decreed in part against defendants 1 to 8 and in part against defendants 10 and 11 for the proportionate area in their respective possession. The critical question in this appeal is whether defendants 10 and 11 should be deemed to be tenants of the plaintiffs and whether they are liable to pay them a proportionate share of rent. The answer to this question depends upon proper construction of S. 22 (2), Bihar Tenancy Act.

[3] The sub-section as amended in 1907 is as follows :

"If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat as the case may be, in respect of the land."

The illustration to the sub-section is :

"*A*, a cosharer landlord, purchases the occupancy holding of a raiyat *X*. *A* is entitled himself to hold the land on payment to his cosharers of the shares of the rent payable to them in respect of the holdings. *A* sublets the land to *Y*, who takes it for the purpose of establishing tenants on it ; *Y* becomes a tenure-holder in respect of the land. Or *A* sublets it to *Z*, who takes it for the purpose of cultivating it himself; *Z* becomes a raiyat in respect of the land."

[4] Learned counsel for respondent relied on 6 Pat. 134.[1] In this case there were two bodies of landlords, one the Banaili Raj, and the other Srinagar Raj. The Banaili Raj acquired the status under S. 22 (2) in respect of about 155 bighas, which it settled with certain other parties. A partition then took place between Banaili Raj and Srinagar Raj by which a part of the 155 bighas was allotted to the Banaili Raj and the rest to Srinagar Raj. The Srinagar Raj sued one of the original tenants and obtained a decree which they attempted to execute. Banaili Raj then instituted a suit for declaration that the party whom Srinagar Raj had sued had no connexion with the land, that Srinagar Raj was entitled only to the proportionate rent of the 81 bighas of land. The two lower Courts held that after the settlement the Banaili Raj had no further interest, that the settlees became raiyats under all the proprietors, that the "peculiar status" which Banaili Raj obtained under S. 22 (2), Bihar Tenancy Act, had ceased. In second appeal Ross J. held that the peculiar status conferred by S. 22 (2) still continued notwithstanding the settlement. He also held that even after partition between the cosharers, the status of the purchaser cosharer in the part of the holding allotted to the other cosharers was not affected.

[5] But the decision so far as it related to the transferee cosharer on partition has been impliedly overruled by the Full Bench decision in A.I.R. 1940 Pat. 467.[2] The decision in 6 Pat. 134[1] was based on 7 P.L.T. 170,[3] 3 P.L.T. 13,[4] 3 P.L.T. 22[5] and 7 P. L. T. 87.[6] The Full Bench made reference to these decisions but preferred not to follow 7 P. L. T. 170.[3]

[6] In A. I. R. 1940 Pat. 462[2] the facts were as follows. The plaintiffs sued for recovery of possession of plot No. 196 in touzi No. 24363. The plot was originally recorded as kasht of Bikhari in touzi No. 9411. In 1897 Narsingh Tewari, ancestor of defendants, purchased it from Bhikhari. At that time Narsingh was a cosharer landlord of the touzi. Subsequently there was partition of the touzi and plot No. 196 was allotted to the new touzi No. 24363 which was patti of another cosharer landlord Sarjug Singh. The cosharers were placed in possession of the new pattis under S. 94, Estates Partition Act. The plaintiffs purchased Sarjug's patti in June 1924. They alleged that they obtained delivery of possession but were dispossessed by the plaintiffs a month later. The plaintiff's claim was resisted by the defendants on the ground that they were entitled to hold possession by reason of S. 22 (2), Bihar Tenancy Act. The Full Bench held that the cosharer landlord who purchased the occupancy right of the land was not a tenant under the other cosharers; nor could he be viewed as occupying the status of the tenant under himself and other cosharers as landlords. The word rent in S. 22 (2) was used in the sense of compensation payable to other cosharers for use and occupation of the land by the purchasing cosharer. It was not used in the sense defined in S. 3 (5) as descriptive of the nature of the payment made by the purchasing co-sharer to his other cosharers. Agarwala J. (now Hon'ble Sir C. M. Agarwala) felt that there was nothing in S. 22 (2) to suggest that a cosharer was entitled to retain possession after the land which he had purchased had been allotted to the patti of another cosharer by partition.

[7] It is convenient at this stage to examine the construction of the relevant provision of statute. Section 22 (2) enacts that

"if such a transferee sublets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat, as the case may be, in respect of the land."

We were invited to hold (by learned counsel for respondent) that the phrase "shall be deemed to be a raiyat" ought to be construed as "shall be deemed to be a raiyat vis-a-vis the purchasing co-proprietor but not vis-a-vis the remaining co-proprietors." In our opinion such a construction would be unreasonable and not in accordance with the policy and object of the statute. The original S. 22 (2) (as it stood before 1907) was :

"If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the right of any third person."

The amended section is

"if the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and if such transferee sublets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat, as the case may be in respect of the land."

The object of the Legislature in enacting S. 22 (2) was to prevent the accrual of occupancy right in land in possession of proprietors and co-proprietors. It was based on the maxim "*nemo potest esse tenens et dominus.*" It was obviously intended that the purchasing cosharer should not himself acquire an occupancy right or by subletting bar the acquisition of raiyati rights by sublessees. If a restricted meaning is given to the word "raiyat" as argued for respondent, the policy and object of the statute would be frustrated. Should there be partition of the estate or a re-arrangement between co-proprietors and the land sublet was under the partition or re-arrangement allotted to another co-proprietor, the sublessee would be in a position of trespasser and be liable to ejectment. In our opinion, there is no warrant for construing this section in this

fashion. There is no reason why having once been deemed to be a raiyat within the meaning defined in the Act (which of course in actual fact he is not) a sub-lessee would cease to be deemed a raiyat and should become a trespasser merely because as a result of a subsequent partition the co-proprietor who had sub-let the land to him ceases to be his landlord and another co-proprietor by operation of law becomes his landlord instead. Let us assume a hypothetical state of facts. A and B are cosharer landlords. A purchases the occupancy holding of a raiyat X in execution of a rent decree obtained by him against X and settles it with a raiyat C. Subsequently there is collectorate partition; and the holding is allotted to B. B claims possession over the holding but A resists the claim. In view of A. I. R. 1940 Pat. 467,[2] B is entitled to recover possession of the holding which has been allotted to his fate. If the restricted construction is adopted, B could treat C as his trespasser and eject him. But if the construction we adopt is correct, B could only treat C as his tenant and claim rent from him.

[8] Our view that sub-lessee would be a "raiyat" under the whole body of landlords is supported by certain authorities. In 4 Pat. L. J. 540[7] Roe and Coutts JJ. stated as follows :

"We may assume, for the purpose of the case, that the plaintiff's story, as given in the plaint, is the correct story, that he is a cosharer proprietor and acquired these lands in the manner contemplated by S. 22, Ben. Ten. Act; but he has also let out the land in the manner contemplated by S. 22 (2), and, that being so, the person to whom he has let out the land becomes a raiyat upon the land, and as a raiyat, whether he has a right of occupancy or not, he cannot be ejected except upon conditions prescribed in the Bengal Tenancy Act, none of which has been fulfilled."

[9] In 8 P. L. T. 69[8] Dawson Miller C. J. observed that a lessee from purchasing co-proprietor might acquire occupancy right after twelve years' possession. In that case X, a cosharer proprietor, had purchased raiyati jote of certain tenants and remained in cultivating possession paying a proportionate part of the rent to the cosharers. In 1913 a partition case was instituted between all the co-proprietors and shortly after the filing of the partition case X sold his proprietary interest to Y who by mutual arrangement allowed X to hold the said raiyati jote land. In 1918 when the final partition took place, the land was treated as bakasht and allotted to the takhta of two other cosharers, A and B, who ejected X, whereupon X brought suits for recovery of possession. The Court held that X was not bound by the treatment of the land in dispute as bakasht in the partition proceedings. It was further held that the arrangement between X and Y which allowed X to remain in possession of the land had effect of creation of a sub-lease by Y in favour of X, who became a tenant of the disputed land under S. 22 (2), Bihar Tenancy Act. The Court observed that X may acquire occupancy right after twelve years' possession.

[10] In an unreported case, S. A. 124 of 1945, Imam J. followed the decision in 6 Pat. 134[1] and held that the sub-lessee was not a necessary party to the rent suit and the purchasing co-proprietor was liable for the rent of the land purchased by him from the original tenant. Das J. agreed but he based his decision on the ground that there was nothing to show that the settlement was *bona fide* or that the other co-sharers accepted the sub-lessee as tenant.

[11] This review of authorities supports our opinion that on a proper construction of S. 22 (2) a person who takes settlement from the purchasing cosharer becomes raiyat under the whole body of landlords provided the settlement is made *bona fide*.

[12] In the present case, however, we are faced with the difficulty that defendants 1 to 8 had settled not the whole but only a portion of the holding they had purchased. The matter is not free from doubt but I venture to think that S. 22 (2) applies only if the purchasing co-proprietor sublets the entire land to a third person, who will then be deemed to be a raiyat in respect of it. The language of neither S. 22 (2) nor its illustration warrants the view that the purchasing proprietor could split the holding into fractions and by separate sub-leases create smaller holdings.

[13] In 23 Pat. 291[9] Shearer J. had taken an apparently different view. In that case the plaintiffs first party were owners of three gandas interest in touzi No 1070. They acquired certain occupancy holdings either by purchase or exchange. They subsequently settled part of lands with the plaintiffs second party who claimed that they were settled raiyats and so acquired right of occupancy as soon as they were let into possession of the lands in suit. Later, there was a partition between the co-proprietors and the land in suit was allotted not to the plaintiffs first party but to defendants first party who were proprietors of touzi No. 1103. In the partition the land was stated as bakasht and after being put in possession of the new estate the defendants first party settled the land with defendants second party. There was struggle for possession between plaintiffs second party on the one hand and the defendants second party on the other. There was a proceeding under S. 145, Criminal P. C., and eventually the plaintiffs second party relinquished possession and undertook to file a civil suit. In the suit which was ultimately instituted the plaintiffs

second party claimed possession of the land. In decreeing their claim Shearer J. held that a settled raiyat to whom a co-sharer landlord who had purchased occupancy holding, had sub-let the land, or any portion of the land comprised in the holding, at once acquired right of occupancy in it.

[14] In that case no specific argument was presented whether S. 22 (2) could apply only if a part of holding was sublet, and the construction of the section was not looked at from that aspect. The case also may be distinguished on the ground that there had been a partition and re-allotment of the land to a different touzi. 18 P. L. T. 700[10] is an important case, the *ratio decidendi* of which supports the view I have taken. In that case facts were that a co-sharer mokarraridar had after purchasing occupancy holdings inducted tenants on the lands and realised higher rents than those which used to be paid by occupancy tenants from whom purchases had been made. The other co-sharer landlord claimed her share of the higher rents so realised. But Fazl Ali J. (as he then was) and Davle J. held that on a proper construction of S. 22 (2) of the Act the rent referred to was the rent of the original occupancy holding and not the rent payable in respect of the tenancies created afterwards by purchasing co-sharer for parts of the holdings. The learned Judges considered that the plaintiff was not entitled to sue for or realise the higher rate of rent.

[15] In the present case the lower Courts have concurrently found that defendants 10 and 11 proved that they had divided the produce with defendants 1 to 8 for the years in suit. The plaintiffs did not claim that defendants 10 and 11 ought to pay the rent direct. But the appeal is instituted on behalf of defendants 1 and 3, purchasing co-proprietors, who made the settlement. Having received their share of usufruct, defendants 1 to 3 cannot now be heard to say that defendants 10 and 11 should again pay rent to plaintiffs for the proportionate area in their possession. If the ratio of 18 P. L. T. 700[10] is correct, the appellants have been rightly held in the present case to be liable to pay the entire compensation to the plaintiffs. I would affirm the decree of the lower Court and dismiss this appeal with costs.

[16] **Manohar Lall J.** — At one time I was inclined to propose that this appeal should be referred to the learned Chief Justice so that the difficult question may be decided by a larger Bench, but having regard to the facts of the present case, it is unnecessary to harass the parties any further.

[17] The facts found are that defendants 1 to 8, the eight annas co-sharer landlords, purchased the holding in execution of a rent decree against the original recorded tenant, and after purchase they settled 9.27 acres of that holding with defendants 10 to 11 and kept the remaining area in their own possession. The remaining eight annas co-sharer landlords instituted the suit giving rise to this appeal for recovery of their share of the produce for the years 1349 and 1350 Fasli in respect of 26 bighas and 18 dhurs of land which were purchased by defendants 1 to 8 as stated already. The co-sharer defendants pleaded that they were in possession only of 7.50 acres of land and the remaining 9.27 acres of land has been settled with defendants 10 and 11 and, therefore, the co-sharer defendants are not liable for the plaintiff's share of the produce of the entire land. Defendants 10 and 11 pleaded that they are not liable to pay any rent to the plaintiffs as there is no relationship of landlord and tenants between them and the plaintiff, and for the years in suit they alleged that they have actually divided the hakmi share with defendants 1 to 8. The Courts below have concurrently granted a money decree to the plaintiffs with respect to their share against the co-sharer defendants. They have also held that the defendants who have taken settlement from defendants 1 to 8 are not liable to pay anything to the plaintiffs.

[18] The real question in controversy before us was as to the applicability of S 22 (2), Bihar Tenancy Act. A large number of cases have been cited before us. Many of them have been reviewed by my learned brother in the judgment which he has just delivered. In my opinion, the question is concluded by two Division Bench decisions of this Court.

[19] Ross J. in delivering the judgment of the Division Bench in 6 Pat. 134[1] observed at p. 138:

"The question is not free from difficulty, but it is important to observe the exact language of S. 22 (2). It is not enacted that if the transferee sublets the land to a third person, such person shall be a tenure-holder or a raiyat, as the case may be in respect of the land, but that such person shall be deemed to be a tenure-holder or a raiyat; that is to say, the section itself recognises the relationship as artificial and, by implication suggests that, by making such a settlement, the transferee is not a landlord, but that the peculiar status conferred upon him by the section as held in 7 P. L. T. 87[6] still continues notwithstanding the settlement. Nor is it apparent on principle why the interest of the transferee co-sharer should be affected merely by his making a settlement with a tenant. It has been held in many decisions in this Court that he is entitled to hold the land which he has acquired, after partition, and I do not see how it can make any difference to this right that he has settled it with a person who is deemed to be a raiyat. The position is certainly anomalous; but the anomaly is the creation of S. 22 (2)."

In view of the decision of the Full Bench in 19 Pat. 893,[2] I am not prepared to hold that

these observations are correct with regard to the position after partition. But it is unnecessary to consider that aspect because in the present case there was no partition between the co-sharer landlords.

[20] 16 Pat. 500[10] proceeds upon the view that so long as there is no partition amongst the co-sharers, the co-sharer purchaser is liable to pay compensation to his co-sharers calculated at the rate of rent payable by the tenant of the occupancy holding at the time of the purchase and not the rent payable in respect of the tenancy which has been created by the co-sharer purchaser. A number of cases have been considered in this judgment and it has been approved by the Full Bench in A. I. R. 1940 Pat. 467.[2]

[21] A contrary view appears to have been taken by Shearer J. in 23 Pat. 291,[9] but I am not hampered by that decision because in that case the learned Judges were considering the position of the tenant after the partition had taken place. Shearer J. considered the argument of Mr. S. N. Bose at p. 310 that the words "shall be deemed to be a raiyat" should be construed as "shaH be deemed to be a raiyat vis-a-vis the co-proprietor, who has sub-let the land, but not vis-a-vis the remaining co-proprietors," and did not accept the argument as sound. But it is to be observed that the learned Judge was considering the soundness of the argument in so far as the sub-lessee would become a trespasser as the result of a subsequent partition.

[22] I propose to examine the matter on general principles. The relevant portion of S. 22 (2) has already been quoted and enacts that if the transferee sublets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat. Ross J. referred to this artificial treatment of the sub-lessee as a raiyat in 6 Pat. 134[1] :

"Now when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were": per Viscount Dunedin in delivering the judgment of the Board in 4 I. T. C. 312[11] at p. 314.

We must, therefore, assume that the sub-lessee must be treated as if he were a raiyat. But raiyat under whom? 18 P. L. T. 700[10] clearly decides that notwithstanding the settlement by the co-sharer landlord with a new sub-lessee at a higher rent, the co-sharer landlords are entitled to claim from the other co-sharers their share of the rent not at the rate at which the co-sharer had made the settlement but under the old rate. This suggests to my mind that even though the sub-lessee is to be treated as a raiyat, the other co-sharer landlords cannot look to him for payment of rent and for an obvious reason. The purchasing co-sharer landlord still enjoys the land but now by receiving rent from a person with whom they have settled it. Under the provisions of S. 116, Evidence Act, the sub-lessee is estopped from denying the title of his landlord, namely the person who has settled the land with him, and, therefore, he is bound to pay the entire rent so settled to the co-sharer landlord, who has settled the land with him and he cannot be heard to say that the person who settled the land with him is only a co-sharer and so entitled to receive his share of the rent only.

[23] In the present case the facts are even more complicated, namely that the co-sharer landlord is in possession of a portion of the holding which he had purchased, and the sub-lessee is in possession of another portion, and further that the co-sharer landlord has been fully paid the share of the produce by the sub-lessee. The suit for compensation was, therefore, rightly decreed against the co-sharer landlords. The defendant sub-lessee was not a necessary party in this case. This was the view expressed by Imam J. in Second Appeal No. 124 of 1945, but in view of the finding arrived at by Das J. who was a member of the Division Bench in that case, that the settlement of the land was not *bona fide* and the evidence did not disclose the circumstances in which the settlement was effected, this decision must be treated as a decision of a single Judge who followed the observations of Ross J. in 6 Pat. 134.[1]

[24] I desire to make it clear that I am not considering the effect of a partition between the co-sharer landlords upon the rights of the sub-lessee of a part or of a portion of the holding settled with him by the original co-sharer whose purchase took place after 1907.

[25] Meredith J. in 23 Pat. 291[9] has thought it fit to sound a note of dissent from the decision of the Full Bench in A. I. R. 1940 Pat. 467.[2] He appears to suggest that the Full Bench has not considered a large number of cases which are noticed by the learned Judge in his judgment and this inclines him to doubt the correctness of the Full Bench decision. With the utmost respect to the learned Judge, many of these cases were cited before us, but they were not noticed in the judgment because we were dealing with a situation before the year 1907.

[26] In 3 P. L. T. 22[5] Das J., observed at p. 24 that he did not desire to express any opinion on the question as to what the position would be under the Amending Act of 1907. Similarly the Full Bench judgment was careful not to express any opinion as to the position after the Amending Act of 1907 and, therefore, it was unnecessary to notice many of the decisions re-

ferred to by Meredith J. For these reasons, I agree that this appeal must be dismissed with costs.

D.R.R. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 207** *[C. N. 76.]*

AGARWALA AG. C. J. AND IMAM J.

*Sheocharan Mahton and others — Appellants* v. *Sanichar Mahton and others — Respondents.*

A. F. A. O. No. 74 of 1946, Decided on 23-12-1946, from decision of Addl. Sub-Judge, Sixth Court, Patna, D/- 24-11-1945.

**(a) Arbitration Act (1940), S. 39 (2)—Scope—Suit referred to arbitration—Award made — Objection to, rejected and order passed in terms thereof—Appeal allowed declaring award invalid—Second appeal does not lie.** [Para 3]

**Annotation :** ('46-Man.) Arbitration Act, S. 39, N. 1.

**(b) Arbitration Act (1940), S. 33 — Question of validity of award can be decided on affidavits.**

It is permissible to a Court to decide the validity or otherwise of an award on affidavits. The Court can also under the proviso to S. 33 take other evidence. [Para 4]

**Annotation :** ('46-Man.) Arbitration Act, S. 33, N. 1.

*Cases referred* :—

1. ('25) 12 A. I. R. 1925 All. 404 : 47 All. 743 : 88 I.C. 76, Jagat Pande v. Sarawan Pande.
2. ('15) 19 C. W. N. 948 : 2 A. I. R. 1915 Cal. 745 : 28 I. C. 557, Saudamini Ghosh v. Gopal Chandra Ghosh.

*B. C. De and Rama Kant Verma* — for Appellants.
*M. Rahman and Rajkishore Prasad* — for Respondents.

**Imam J.** — This is an appeal by the defendants against the decision of the Sixth Additional Subordinate Judge of Patna. The plaintiffs had instituted a suit for declaration of title and recovery of possession. After filing of the written statement by the defendants all the parties agreed that the dispute should be referred to arbitration. Accordingly eleven arbitrators were appointed as agreed to by the parties in the suit. After some time the arbitrators submitted their award to the Court, but it appears that only eight of them had signed it According to the award the plaintiffs' suit would stand dismissed. Plaintiffs objected to the award on various grounds, the principal ground being that all the eleven arbitrators did not attend the arbitration proceedings, and, therefore, the award was invalid. The Munsif, before whom the objections were raised, decided that the award was not invalid and pronounced judgment in terms of the award. Against this decision of the Munsif the plaintiffs appealed, and the appeal was heard by the Sixth Additional Subordinate Judge, who came to the conclusion that the award was invalid, having regard to the fact that the proceedings in arbitration were conducted in the absence of all the eleven arbitrators taking part in the same. He found as a fact that the case before him was not one where all the arbitrators had attended the proceedings, but that only some of them attended the proceedings and a majority of them had signed the award.

[2] Mr. Rahman on behalf of the respondents took a preliminary objection that no second appeal lay in view of the provisions of S. 39, Arbitration Act of 1940. Mr. De, however, contended that the lower appellate Court had no jurisdiction to entertain the appeal at all, and, in view of certain decisions of this Court, a second appeal lay. He urged, however, that if no second appeal lay, the appeal may be treated as an application in revision. He further objected that it was illegal for the lower appellate Court to have found that all the arbitrators had not attended the arbitration proceedings as there was no evidence of it except the affidavits. He also cited certain authorities of this Court to show that it was not necessary for all the arbitrators to have signed the award when it was clear that a majority decision was binding on the parties. In this case, out of eleven arbitrators eight had signed the award, and their award was against the plaintiffs.

[3] In meeting the preliminary objection raised by Mr. Rahman Mr. De argued that the decision of the Munsif refusing to set aside the award and pronouncing a judgment in accordance with it was a case where the order refusing to set aside the order had merged into decree, and, accordingly, no appeal lay. He referred to S. 17 of the Act which provides :

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, 'and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

He pointed out that there was no separate order refusing it to set aside the award, but that the Munsif had pronounced judgment in accordance with the award and, in the course of that judgment, had refused to accede to the objections of the plaintiffs and had refused to set aside the award. Section 39 of the Act, however, provides that

"an appeal shall lie from the following orders passed under the Act, and from no others, to the Court authorized by law to hear appeals from original decrees of the Court passing the order."

It then enumerates a number of instances of orders appealable, and the relevant clause is cl. (vi) which speaks of an order setting aside or refusing to set aside an award. By sub-s. (2) of S. 39 it is provided that no second appeal shall

lie from an order in appeal under this section. The question which has to be determined is whether, by pronouncing a judgment in accordance with the award and rejecting the grounds for setting aside the award, the action of the Munsif, in law, prevents the plaintiffs from urging that no second appeal lies as stated in S. 39. It seems to me that S. 39 is a specific provision which provides for an appeal against certain orders of the Court, one of which is an order refusing to set aside an award. The Act cannot be so interpreted as to destroy this specific provision for an appeal by the argument that a judgment having been pronounced in accordance with S. 17, no appeal lay It seems to me that the scheme of the Act provided that an appeal shall lie against the orders enumerated in S. 39 and from none others on the one hand, and that no appeal shall lie against a decree which is made in accordance with an award. The reason for this distinction appears to me to be indicated in S. 30 of the Act which provides that an award shall not be set aside except on one or more of the following grounds: (a) that an arbitrator or umpire has misconducted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under S. 35; (c) that an award has been improperly procured or is otherwise invalid; that is to say, the grounds on which an appeal is allowed against an order refusing to set aside an award are limited, and the merits of the litigation between the parties cannot be raised. In the present case cls. (a) and (b) of S. 30 would not be applicable, and, under cl. (c) the only question that could be determined was as to whether the award was otherwise invalid, there being no question of it having been improperly procured. In my opinion, if all the arbitrators do not attend the arbitration proceedings, the award given in the proceedings would be invalid. The provisions of S. 17 merely state that, where a Court refuses to set aside the award, it shall pronounce judgment in accordance with it with a decree following, and no appeal shall lie against such a decree. There is, therefore, a clear distinction between an appeal against an order as mentioned in S. 39 and an appeal against a decree as mentioned in S. 17. The question of merger does not arise, in my opinion, and, for this proposition one may refer to the decision of the Allahabad High Court in A. I. R. 1925 ALL. 404[1] and to the decision of the Calcutta High Court in 19 C. W. N. 948.[2] I would accordingly, hold that the preliminary objection raised by Mr. Rahman is a valid one, and that no second appeal lies to this Court.

[4] It is unnecessary, therefore, to decide the other question raised by Mr. De that as the lower appellate Court had no jurisdiction to entertain an appeal therefore a second appeal was permissible, as I have already held that an appeal against the order of the Munsif was permitted under S. 39. For the other submission made by Mr. De that the decision of the lower appellate Court was made on no evidence except affidavits, reference must be made to S. 33 of the Act which provides:

"Any party to arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit:

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also and it may pass such orders for discovery and particulars as it may do in a suit."

This contention of Mr. De, therefore, must be rejected as it is permissible to a Court to decide the validity or otherwise of an award on affidavits. The Court can also, under the proviso, take other evidence.

[5] In the circumstances. I am satisfied that no interference is called for against the order of the lower appellate Court, and the appeal must be dismissed with costs.

**Agarwala Ag. C. J.** — I agree.

S.C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 208** *[C. N. 77.]*

IMAM AND BENNETT JJ.

*Sheo Narain Sah and others — Decreeholders — Appellants* v. *Mt Deolochan Kuer and others — Judgment-debtors — Respondents.*

A. F. O O No. 320 of 1944, Decided on 27-11-1946, from order of Sub-Judge, 1st Court, Chapra, D/- 11-7-1944.

**(a) Transfer of Property Act (1882), S. 82—Right of contribution does not affect relations between mortgagor and mortgagee as such—It operates only as between co-mortgagors — It is not *per se* matter directly or constructively in issue in mortgage suit for sale.**

The right of contribution conferred by S. 82, T. P. Act, just as does any other right of contribution between co-obligors, operates solely as between the co-mortgagors and does not affect the relations between the mortgagors and the mortgagee as such. Thus the right of contribution arises only when one of the co-mortgagors has been compelled to pay to the mortgagee more than his rateable share. The right of contribution *per se*, therefore, is not a matter which is either directly or constructively in issue in a mortgage suit for sale, since until after decree and sale no right of contribution arises; nor will it arise even after decree and sale, unless the mortgage is satisfied by less than the sale of the whole of the mortgaged properties. [Para 5]

Annotation: ('45 Com.) T P. Act, S. 82, N. 2.

**(b) Civil P. C. (1908), S. 47 — Mortgage decree for sale—Execution of Claim to automatic reduction of mortgage-debt or to right of set-off against**

**mortgage-debt—Question does not relate to execution, discharge or satisfaction of decree and cannot be entertained.**

Where a mortgagee has purchased a part of the mortgaged property and a mortgage decree for sale has been passed, the claim of the mortgagor in execution, to an automatic reduction of the mortgage debt or to a right of set off against the mortgage debt cannot be entertained as it does not relate to the execution, discharge or satisfaction of the decree itself within the meaning of S. 47, because the mortgage debt has merged in the decretal debt and it cannot be said that the decretal debt has been automatically reduced by something which took place prior to the date of the decree: 10 A. I. R. 1923 Pat. 44 ; 30 A. I. R. 1943 Mad 637 ; 33 A. I. R. 1946 Mad. 155 and 23 A. I. R. 1936 Cal. 537, *Rel. on.* [Para 6]

Per *Imam J.*—It is not open to an executing Court to go behind a final decree or to question the findings arrived at in the suit on which the final decree is based. The right to contribution can, if a cause has arisen for the same, be enforced in a regular suit. [Para 19]

**Annotation:** ('44-Com.), C. P. C., S. 47, Notes 28, 29.

**(c) Civil P. C. (1908), O. 34, R. 5 — Final decree for sale—Mortgage-debt merges in decretal debt — Neither right of total nor of partial redemption conferred by S. 60, T. P. Act, survives final decree for sale—Transfer of Property Act (1882), S. 60.**

The mortgagor's right of redemption is a statutory right governed by S. 60, T. P. Act. Paragraph 1 of S. 60, T. P. Act. clearly shows that the right of partial redemption thereby recognized is a right corresponding in all essential respects to the right to redeem conferred upon the mortgagor by para. 1 thereof. This right is, however, a right to redeem mortgage money which is commonly referred to as a mortgage-debt and upon the ordinary rules as to *res judicata*, the mortgage-debt merges in the decretal-debt. Hence after the passing of the final mortgage decree for sale, neither the right of total redemption nor the right of partial redemption conferred upon the mortgagor by S. 60, T. P. Act, survives the final decree for sale ; all that remains thereafter is the different right of total redemption conferred by O. 34, R. 5, Civil P C. [Paras 7, 8]

**Annotation :** ('45-Com.), T. P. Act, S. 60, Notes 4, 41; ('44-Com.) C. P. C., O. 34, R. 5, Notes 13, 20.

*Cases referred* :—

1. ('46) 33 A. I. R. 1946 Mad. 155 : I. L. R. 1946 Mad. 720, Thirumala Venkata Shrinivasa Charyalu v. Srinivasa Venkatavaradacharyulu.
2. ('25) 6 P. L. T. 390 : 10 A. I. R. 1923 Pat. 44 : 71 I. C 26, Sarju Lal v. Baijnath.
3. ('43) 30 A. I. R 1943 Mad. 637 : 213 I. C. 382, Veerappa Chettiar v. Chandramouleswara Ayyar.
4. ('36) 23 A. I. R. 1936 Cal. 537 : 168 I. C. 416, Aymamud Sarcar v. Ebaruddin Sarcar.
5. ('42) 69 I A. 98 : 29 A. I. R. 1942 P. C. 50 : I. L. R 1942 All 608 : 202 I. C. 265 : I L R. 1942 Kar P C. 99 (P C.), Ramchand v. Prabhu Dayal
6. ('36) 23 A I. R. 1936 P. C. 63 : 15 Pat 210 : 63 I. A 114 : 160 I. C. 285 (P.C.), Kusum Kumari v. Debi Prosad.
7. ('26) 13 A. I. R 1926 Mad 816 : 49 Mad. 691 : 96 I. C. 607, Thirukonda Ellarayan v. Rangaswami Aiyar.
8. ('18) 45 I. A. 130 : 5 A I R 1918 P C 34 : 40 All. 407 : 45 I C. 798 (P.C.) Het Ram v. Shadi Ram
9. ('20) 47 I A 71 : 7 A I. R 1920 P. C. 79 : 42 All. 364 : 55 I. C. 969 (P. C)., Matrumal v. Mt. Durga Kunwar.
10. (1803) 3 East. 251, Drake v. Mitchell.
11. ('21) 48 I. A. 465 : 9 A. I. R. 1922 P. C. 11 : 43 All. 469 : 65 I. C. 151 (P.C.), Mt. Sukhi v. Ghulam Safdar.
12. ('28) 15 A. I. R. 1928 Pat 589 : 8 Pat. 216 : 114 I. C. 216, Jageswar Mandal v. Sridhar Lal.
13. ('19) 43 Bom. 334 : 5 A. I. R. 1918 Bom. 1 : 49 I. C. 894 (F.B.), Ramji Bapuji v. Pandharinath Rawji.
14. *See* ('34) 21 A. I. R. 1934 P. C. 205 : 56 All. 561 : 61 I. A. 362 : 151 I. C. 37 (P C.),
15. ('44) 31 A. I. R. 1944 Pat. 179 : 22 Pat. 637 : 214 I. C 99, Rameshwar Prasad v. Devendra Narayan.
16. ('36) 14 Pat. 488 : 22 A. I. R. 1935 Pat. 385 : 155 I. C. 976, Harihar Prasad v. Gopal Saran.

*S. N. Datta and A. N. Mitra*—for Appellants.
*L. K. Jha, A. S. Sinha, S. N. Banerji and J. C. Sinha*—for Respondents.

**Bennett J.**—This is an appeal from the decision of the Subordinate Judge of the First Court, Chapra, refusing to allow execution to proceed upon an execution petition filed by the appellant.

[2] On 12th September 1925, one Tinkauri Singh mortgaged certain properties to the appellant to secure the repayment of a sum of Rs. 44,000. On 10th July 1937, the appellant instituted a suit against Tinkauri Singh's widow and certain other defendants sued against as transferees of the right of redemption in the mortgaged properties, for the recovery of the mortgage monies plus interest to date and for an order for the sale of the mortgaged properties. On 22nd September 1938, a preliminary decree for sale in the mortgage suit was passed ordering the defendants to pay the sum of Rs. 101,396-14-0 with future interest at 6 per cent. per annum into Court on or before 31st March 1939. In January 1939, some fifteen villages comprised in the mortgaged properties were sold to the appellant, who had obtained leave to bid, in execution of a money decree obtained by the appellant against the owners of some of the mortgaged properties and on 17th January 1939, the sale to the appellant was confirmed. The owners of the properties in question had been dismissed from the mortgage suit on the ground that they claimed a paramount title thereto into which claim the Court did not consider it necessary to inquire In the proclamation for sale of the said villages the appellant had notified that they were sold subject to the encumbrance of the said mortgage to himself On 8th July 1939, a final decree in the mortgage suit was passed under which the mortgaged properties, including those purchased by the appellant in the execution of the above-mentioned money decree, were ordered to be sold and the proceeds were ordered to be applied in payment of the monies decreed in the preliminary decree. On 1st July 1942, the appellant applied for execution of the said final decree and on 11th July 1944, the order now under appeal was passed refusing to allow execution to proceed upon the ground that the appellant was bound first to ascertain

the quota of the contribution which he was liable to make by reason of his above-mentioned purchase of some of the mortgaged properties under the provisions of Ss. 60 and 82, T. P. Act, 1882, and to give a set off of that amount against the decretal debt in respect of which he was seeking execution.

[3] Mr. S. N. Datta who argued the case for the appellants contended, firstly, that the respondents' right of contribution was a matter that might and ought to have been made a ground of defence in the suit for sale and was, therefore, *res judicata*, and secondly, that in any event the respondents' right of contribution was not *per se* a matter relating to the execution, discharge and satisfaction of the decree for sale within the meaning of S. 47, Criminal P. C., and could not, therefore, be raised in execution proceedings.

[4] Mr. L. K. Jha, for the respondents, contended, firstly, that there was nothing on the record from which it could properly be inferred that the respondents could with the exercise of reasonable diligence have become aware, before the passing of the final decree in the mortgage suit, of the purchase by the mortgagee of the right of redemption in the mortgaged properties sold in Execution Case No. 80 of 1937, or, therefore, of their right to claim contribution in the mortgage suit and that their right of contribution was not, therefore, barred by *res judicata*.

[5] The right of contribution conferred by S. 82, T. P. Act, 1882, just as does any other right of contribution between co-obligors, operates solely as between the co-mortgagors and does not affect the relations between the mortgagors and the mortgagee as such. Thus the right of contribution arises only when one of the co-mortgagors has been compelled to pay to the mortgagee more than his rateable share. The right of contribution, *per se* therefore, is not a matter which is either directly or constructively in issue in a mortgage suit for sale, since until after decree and sale, no right of contribution arises, nor will it arise even after decree and sale, unless the mortgage is satisfied by less than the sale of the whole of the mortgaged properties. Mr. L. K. Jha, however, argued that a purchase by the mortgagee of a share in the right of redemption operates *pro tanto* to discharge the mortgage-debt, that the amount of the mortgage-debt was directly in issue in the mortgage suit, that, therefore, the *pro tanto* discharge thereof as a result of the purchase by the mortgagee was also constructively if not directly in issue in the mortgage suit, that in the absence of evidence that the respondents in question could by reasonable diligence have become aware of their right to claim the *pro tanto* discharge of the mortgage-debt there was no *res judicata* of that claim, that where a mortgagee decree-holder for sale purchases part of the mortgage property, the decretal-debt is thereby *pro tanto* reduced, that in such a case the mortgagee cannot thereafter seek to enforce the execution of the decree for the full decretal amount but is bound to give credit for his rateable share and that if it be proper in such circumstances to compel the mortgagee to give credit for his rateable share, it was equally proper to do so in the circumstances of this case. In my opinion, this argument is fallacious in several respects. It is unnecessary for me to express any final opinion as to the proposition that the purchase by the mortgagee of a share in the right of redemption operates *ipso facto* as a *pro tanto* discharge of the mortgage-debt. I would, however, remark that if any such principle exists, it is a little surprising that it should not have been expressly enunciated in so comprehensive an enactment as is the Transfer of Property Act, 1882, and I am inclined respectfully to agree with the view of the position taken by Horwill J., with whom Bell J. concurred in A. I. R. 1946 Mad. 155[1] at p. 156 where he observed that :

"It is thus seen that the reason why a mortgagee who acquires the interest of a mortgagor cannot be given a decree for the full amount is that he has himself become owner of a part of the mortgaged property and so his share of the mortgage burden can be set-off even in the mortgage suit against the claim on the mortgage. There is in such a case no fiction of a *pro tanto* discharge of the mortgage amount, except in a very loose sense of that expression."

But even so, the question of *res judicata* in relation to this right of set-off would still remain.

[6] I am unable, however, to understand how in any event, this question can be gone into in execution proceedings. The executing Court must take the decree as it stands, its only power under S. 47, Civil P. C., is to decide questions relating to the execution, discharge or satisfaction of the decree and, whether the claim of the respondents in question is to an automatic reduction of the mortgage debt or to a right of set-off against the mortgage-debt, it is based upon an event which took place prior to the decree and can only now be adumbrated in contradiction of the decree. Such a question does not relate to the execution, discharge or satisfaction of the decree itself. *A fortiori*, if the claim is to an automatic reduction of the mortgage-debt, it cannot be entertained because the mortgage-debt has merged in the decretal debt and it cannot be suggested that the decretal-debt has been automatically reduced by something which took place prior to the date of the decree. The argument by way of analogy to the alleged position where a mortgagee decree-holder has himself pur-

chased a share in the right of redemption is, in my opinion, incorrect in law. In this respect, I am bound by the decision of the Division Bench of this Court in 6 P. L. T. 390.[3] In that case, the mortgagee decree-holders had purchased some of the properties subject to the mortgage from the mortgagors and in the execution proceedings the mortgagor contended that the properties so purchased should be sold first. The learned Subordinate Judge acceded to this argument but, on appeal to this Court, his order was set aside. The grounds for the decision were thus stated by Das J.:

"Numerous authorities were cited on behalf of the parties before us. It is unnecessary to discuss all those authorities; it is sufficient to say that though here and there a discordant note has been struck, still the balance of authorities is clearly in favour of the view that the decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases and that, if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security; but I do not think that an enquiry as to rateable distribution of the mortgage-debt can be made in execution proceedings without serious complications . . . . . As purchasers of some of the mortgaged properties, they must themselves contribute to the mortgage-debt, but the problem is not solved by compelling the decree-holders to sell the properties which they have themselves purchased. The course adopted by the learned Subordinate Judge has unduly favoured the respondents; and for that there is no warrant either in law or in equity. As I have said before, the equities arising as a result of the transactions that have taken place since the mortgage was executed cannot without serious inconvenience be worked out in the execution proceedings, and I must prefer the rule which gives the decree-holders complete dominion over the sale leaving the equities to be worked out in a properly constituted suit between the parties."

This decision has been followed and approved by Kuppuswami Ayyar J. in A.I.R. 1943 Mad. 637[3] and again quite recently by a Division Bench of the Madras High Court in A.I.R. 1946 Mad. 155.[1] In this latter case, after stating his reasons as already above cited for concluding that there was no automatic and *pro tanto* discharge of the mortgage-debt when the mortgagee purchases a share in the right of redemption, Horwill J., continues as follows:

"When we come to consider the case with which we have to deal in this appeal, namely, where a decree has been passed, it is still more difficult to see how by the acquiring of the decree the decree can be said to have been automatically discharged in part. It seems to us that a decree can only be discharged either by a payment of the whole or part of the decree amount or by agreement between the parties."

In A.I.R. 1936 Cal. 537,[4] Mitter J. after reviewing the authorities, arrived at the same conclusion by a different process of reasoning. This first and main contention of the respondents, therefore, fails.

[7] Mr. L. K. Jha next argued that by reason of the purchase by the appellant of a share in the equity of redemption the respondents acquired a right of partial redemption, that this right of partial redemption survives under O. 34, R. 5 of Sch. 1, Civil P. C., until confirmation of the sale in the present execution proceedings, that since O. 34, R. 5 deals at once with the right of redemption and the execution of the decree, it can hardly be suggested that this right of redemption is not a matter relating to the execution, discharge or satisfaction of the decree, that in order to enable the respondents to avail themselves of their right of partial redemption there must be an inquiry and apportionment which will necessarily result in the ascertainment of the appellant's liability to contribute and that once that liability is ascertained it would be inequitable to construe S. 47, Civil P. C., so as to debar the respondents from setting-off the amount so ascertained against the decretal debt, the more particularly since the effect of S. 60, T. P. Act, 1882, where the mortgagee acquires a share in the right of redemption is to translate the right of contribution into a right of partial redemption: 69 I.A. 98[5] at p. 108. The first answer to this contention is that the respondents in their petitions of objection to the execution petition have not asked for an inquiry or apportionment on any such grounds. The second answer is that the fact, if it be a fact, that S. 47, Civil P. C., may be invoked to require an inquiry and apportionment upon one ground is no reason to order an inquiry and apportionment upon some other ground if the latter ground is not within the scope of the section. Nevertheless, whether the above answers be good or bad, having regard to the fact that the execution petition was filed over four years ago and since the point has been raised and argued before us, I do not think it would be satisfactory to dispose of this appeal in one way merely to allow the respondents to take this point hereafter before the Subordinate Judge and come back here either as appellants from or respondents to an appeal from his decision thereon in another four years time. The first debatable issue in this contention seems to me to be whether the right of partial redemption of a co-mortgagor, a party to the suit, survives under O. 34, R. 5, Civil P. C., until confirmation of the sale made under a final decree for sale or whether the final decree for sale operates to extinguish the right of partial redemption. The

mortgagor's right of redemption is a statutory right governed by S. 60, T. P. Act, 1882. The wording of the final paragraph of that section shows clearly that the right of partial redemption thereby recognized is a right corresponding in all essential respects to the right to redeem conferred upon the mortgagor by para. 1 thereof. But this right is expressly stated as a right to redeem the mortgage-money and the mortgage-money is referred to in S. 58 (a) of the Act as "the principal money and interest of which payment is secured for the time being." These monies are commonly referred to as the mortgage debt and there is no doubt whatever that, upon the ordinary rules as to *res judicata*, the mortgage-debt merges in the decretal debt, and that that is so under the provisions of O. 34, Civil P. C., is clear from the judgment of their Lordships of the Privy Council in A I. R. 1936 P. C 63.[6] That being so, the moment the final decree is passed there is no longer any mortgage-debt or mortgage-money which the mortgagor can pay or tender to the mortgagee. That this is so follows conclusively from a consideration of the position as it would be if that were not so. In that event the mortgagor who, under the form of decree which the Court is directed to pass by the terms of O. 34, R. 4 (1) and R. 5 (3), is entitled to be paid thereunder, in addition to the mortgage money, the monies referred to in O. 34, R. 2 (1) (a) (ii) and (iii), would find himself liable under S 60, T. P Act, 1882, to be deprived of the full benefit of his decree and to lose his security against payment only of the mortgage-money. The Legislature cannot be taken to have intended this result; nor, indeed, does this result flow from the application of the ordinary canons of construction to the statutory provisions in question. Order 34, R. 5 must be read together with S. 60, T. P. Act, if possible and, if it cannot, then O. 34, R. 5 the later statutory enactment, which takes effect as if enacted in the Civil Procedure Code itself, will prevail. Not only can these two provisions be read together, but when S. 60, T. P. Act, 1882, is given what I understand as above-mentioned to be its ordinary meaning, it in no way conflicts with the provisions of O. 34 R. 5. It follows from these considerations that not only is the mortgage-debt merged in the decretal debt, but also firstly, that as between the mortgagee and the mortgagors parties to the suit for sale, the mortgage security merges in the decree and is replaced by the security of the order for sale which merger is also in accordance with the ordinary principles of *res judicata*, the lower mortgage security which the mortgagee necessarily relies upon in his suit for sale merging in the higher security of the resulting decree; and secondly, that the right to redeem conferred by S. 60. T. P. Act, 1882, including the corresponding right of partial redemption thereby conferred, is extinguished by the final decree passed under O. 34, R. 5 (3) and that the mortgagor and so each co-mortgagor, receives in exchange the right to redeem granted by O. 34, R. 5 (1) namely, right to redeem the whole property by payment of the full decretal debt, the relationship between the parties as the use in O. 34, R. 5, Civil P. C., of the words 'plaintiff' and 'defendant' themselves also indicates being no longer that of mortgagor and mortgagee but that of judgment-debtor and judgment-creditor governed by the decree and the terms of O. 34, R. 5, Civil P. C. There is nothing inequitable in the right of partial redemption being so extinguished, since in the suit for sale each co-mortgagor could have cross-claimed for partial redemption. Having failed to do so in the suit, it would be both inequitable and unsatisfactory to allow him to do so in the execution proceedings. In A. I. R. 1926 Mad. 816[7] a Division Bench of the Madras High Court arrived at the same conclusion; both the learned Judges relied upon the principles of *res judicata* to which I have adverted and Wallace J., analysed the effect of the repeal of the original Ss. 86 to 93, T. P. Act, as follows :

"Rules 2 and 3 of O. 34, Civil P. C., correspond to the old Ss. 86 and 87, T. P. Act. Rules 4 and 5 to Ss. 88 and 89 and Rr. 7 and 8 to Ss. 92 and 93; but the clause under S. 89 relating to the extinguishment of the security and the right to redeem has disappeared, and does not appear in R. 5, though similar clauses are retained in Rr. 3 and 8. I think however, it is clear that it does not appear in R. 5 because it is not necessary. Under the old procedure the preliminary decree which allowed redemption remained the executable decree, and, therefore, the right to redeem was not extinguished automatically by the order absolute itself. So it was necessary to enact that on the passing of the order absolute it should disappear. Now the right to redeem embodied in the preliminary decree simply does not appear in the final decree which is now the executable decree. Therefore it disappears when the final decree is passed just as before it disappeared when the order absolute was passed. What was previously effected by direct statutory provision is now effected by procedure."

The learned author of Edn. 2 of Sir Dinshah Mulla's commentary on the Transfer of Property Act, 1882, in his note upon the scope of the phrase "decree of a Court" in para. 2 of S. 60, T. P. Act, 1882, states that the phrase extends only to final decrees for foreclosure under either O. 34, R. 3 (2) or under O. 34, R. 8 (3), Civil P. C., and not to a final decree for sale. The reasons advanced in the note in Edn. 2 of the commentary are as follows:

"In decrees for sale the repealed Ss. 89 and 93 of the Act provided that on the making of the order for sale the right of redemption was extinguished. The decisions of the Privy Council in 45 I. A. 130[8] and 47 I. A.

71[9] were based on the law as enacted in these sections. But all the Courts held that a mortgagor could stop a sale under S. 291, Civil P. C., 1882, and all the Courts except Calcutta held that a mortgagor could have a sale set aside under S. 310A of the same Code. This seemed to imply that the right of redemption continued even after order absolute for sale, and the Calcutta High Court was constrained to construe S 89 as referring to the extinction of the right of redemption on the actual sale and distribution of the sale proceeds. This was doing violence to the section; but the section was bad law, for a decree for sale is but a judgment on the debt and though the debt merges in the judgment the collateral security of the mortgage does not merge: (1803) 3 East. 251.[10] The provision for the extinction of the right of redemption was therefore omitted in Rr. 5 and 8 of O. 34. The Privy Council in 48 I. A. 465[11] said that the effect of this omission was that the law remained the same as it was before the passing of the Transfer of Property Act. And before the Act a decree for sale had not the effect of extinguishing the right of redemption. The Allahabad High Court held that the effect of the repeal of S. 89 was that the right of redemption was not extinguished by the decree for sale but by the sale. The Legislature has however made the law quite clear, for the Rr. 5 and 8 as amended by Act 21 [XXI] of 1929 expressly state that the mortgagor's right of redemption subsists till the confirmation of the sale held in execution of the decree for sale on a mortgage. A Bench of the Calcutta High Court seemed to accept this; but another Bench took the opposite view on the ground that the amending Act 21 [XXI] of 1929 was not retrospective. After the section of the Transfer of Property Act was transferred to the Code of Civil Procedure, 1908, the High Court of Calcutta has held that a mortgagor can have a sale set aside under O. 21, R. 89, corresponding to S. 310A, Civil P. C., 1882."

[8] In my respectful opinion, the learned author has lost sight of the fact that we are not dealing with an equity of redemption but with two separate and statutory rights of redemption conferred by the Transfer of Property Act, 1882, the one under S. 60 upon the mortgagor or mortgagors and the other under S. 91 upon persons besides the mortgagor. There was no principle of law or justice which required that upon the extinction of the right of redemption conferred by S. 60 the other right of redemption conferred by S. 91 should also be extinguished, but this unfortunate and probably unintended result flowed from the now repealed provision in S. 89, T. P. Act, 1882, under which the mortgage security was extinguished by a final decree for sale. It was for this reason that the old S. 89, T. P. Act, 1882, operated inequitably. I respectfully disagree with the proposition that a decree for sale is but a judgment on the debt. A debt in itself provides no ground upon which to claim a sale of immovable property, that claim is based on the mortgage security and when the claim based thereon is decreed the mortgage security necessarily merges in the decree vis-a-vis the defendant in the suit. The case in (1803) 3 East. 251,[10] is no authority for the proposition that a decree for sale is but a judgment on the debt. All that case decided is that where a security for a debt is given, the security does not merge in a judgment for the debt given in an action based solely on the debt. Even if, before the Transfer of Property Act, 1882, the mortgagor's right of redemption, as distinct from the right of redemption possessed by persons other than the mortgagor continued even after an order absolute for sale, there is no inference that the replacement of S. 89, T. P. Act, 1882, by O. 34, R. 5, has thrown the law back to what it was before the passing of the Transfer of Property Act; that question depends entirely upon the proper construction to be put upon O. 34, R. 5, which now governs the position; it is only if O. 34, R. 5 is itself consistent with an intention to revert to the earlier law that such a result would follow and I have already given my reasons for thinking that the wording of O. 34, R. 5 is inconsistent with such a result so far as concerns the mortgagor's right to redeem under S. 60, T. P Act, 1882. The decision of their Lordships of the Privy Council in 48 I A. 465,[11] is not, in my respectful opinion, an authority to the contrary, since it relates only to the effect of a final decree for sale upon the right of redemption granted by S. 91, T. P. Act, 1882, to persons, other than the mortgagor, who are not made parties to the suit for sale. Upon the ordinary principles of law, the rights of such persons should not be affected by a decree to which they were not parties, but that was the unfortunate and unfair result which flowed from the provision in the now repealed S. 89, T. P. Act, 1882, that upon the passing of a final decree for sale the security was extinguished. The omission of that provision from O. 34, R. 5, Civil P. C., now avoids that result and there being nothing in S. 91, T. P. Act, which compels or even indicates such a result, the effect of the replacement of S. 89, T. P. Act, 1882, by O. 34, R. 5 so far as persons who are entitled to redeem under S. 91, T. P Act, and who are not made parties to the suit for sale, is to place them in the same position as they were before the Transfer of Property Act, 1882. It seems to me, therefore, that O. 34, Civil P C., and Ss. 60 and 91, T. P. Act, 1882, now form a consistent series of provisions whose symmetry will in any way be interfered with by holding that upon the application of the ordinary rules of *res judicata* and upon the plain and ordinary meaning of O 34, R. 5, Civil P. C., and S. 60, T. P. Act, the words in S 60, T. P. Act, 1882, provided that the right has not been "extinguished by decree of a Court" include an extinguishment of the mortgagor's rights of total and partial redemption by the merger of those rights in the final decree for sale and in the separate and different right of total redemption granted by O. 34, R. 5, Civil

P. C. It follows that the respondents' contention based upon the continuance of the right of partial redemption after final decree for sale entirely fails. Neither the right of total redemption nor the right of partial redemption conferred upon the mortgagor by S. 60, T. P. Act, 1882, survives the final decree for sale; all that remains thereafter is the different right of total redemption conferred by O. 34, R. 5, Civil P. C.

[9] I have already explained my reasons for thinking that the judgment of their Lordships of the Privy Council in 48 I. A. 465[11] is not inconsistent with the conclusions which I have reached. For the same reasons, I do not think that the other case relied upon in this connection by Mr. L. K. Jha as being inconsistent with the views of the learned Judges of the Madras High Court in A. I. R. 1926 Mad. 816[7] above referred to, namely A. I. R. 1928 Pat. 589[12] which also relates to the rights of redemption of a puisne mortgagee not a party to the suit for sale, is of any assistance to the respondents. Similarly, I do not think that either the decision of the Bombay High Court in 43 Bom. 334[13] which deals with the right of redemption under O. 34, Rr. 7 and 8, Civil P. C., or of their Lordships of the Privy Council in *Raghunath Singh* v. *Hansraj Kunwar*[14] which dealt with the right of redemption under the old S. 92, T. P. Act, 1882, which is now replaced by O. 34, R. 7, Civil P. C., assist the respondents. Mr. L. K. Jha also referred us to A. I. R. 1944 Pat. 179[15] and 14 Pat. 488,[16] but those cases merely establish that the right of contribution survives the preliminary decree and that matters occurring after the preliminary decree and before the final decree and affecting the amount due thereunder are properly taken into account in the final decree.

[10] No doubt, it might be argued that on the facts of this particular case, there had been no merger of the mortgagors' rights of partial redemption, because prior to the date of the final decree they were not and could not with the exercise of reasonable diligence have become aware that this right had arisen. In my opinion, so long as the final decree stands, it is not open to the respondents to contend that the merger has not taken place. Their remedy, if any, is to attack the decree itself, but that they cannot do in execution proceedings. Even if that were not so, it seems to be most undesirable that questions of this nature involving a complicated inquiry into questions of fact should be allowed to be raised in execution proceedings and the undesirability is greatly emphasised in the particular circumstances of this case where the question of the paramount title to the properties purchased by the mortgagee will necessarily be in issue.

[11] In regard to the cross-objection taken by the respondents based on the fact that in the execution petition the decree-holders have mentioned certain villages which have two Thana numbers, whereas the mortgage decree contains no mention of any Thana number and only names of certain villages with certain Tauzi numbers, and to the effect, therefore, that the decree-holders are entitled to proceed only against one Thana number, I did not understand Mr. L. K. Jha to press this objection and, in any event, I agree with the learned Subordinate Judge in overruling the objection. It does not seem to me that the alleged discrepancy between the execution petition and the mortgage-decree raises any doubt as to the actual properties included in the decree, and the discrepancy, therefore, appears to me to be one of extra but not absolutely necessary description.

[12] For these reasons I would allow the appeal and dismiss the cross-objection and direct that the case be remanded to the learned Subordinate Judge with a direction to proceed with the execution in due course of law.

[13] The respondents will pay the appellants' costs both of the appeal and of the cross-objection.

[14] **Imam J.** — The decision of this Court in 6 P. L. T. 390[2] referred to by my learned brother is binding upon us. If the circumstances appearing in this appeal had warranted a conclusion to the contrary, the only course open would have been to refer the case to a larger Bench.

[15] The deceased Tinkauri Singh had executed a mortgage bond dated 12th September 1925, in favour of the appellants for Rs. 44,000. The respondent is the widow of Tinkauri Singh. This bond shall hereafter be referred to as the mortgage bond in question. The appellants obtained a preliminary decree on the mortgage bond in question in conformity with O. 34, R. 4, Civil P. C. This preliminary decree was passed on 22nd September 1938, and a final decree was passed on 8th July 1939. It is this final decree which the appellants seek to execute.

[16] It is necessary to state some further facts as would appear from the judgment of the Subordinate Judge in Mortgage Suit No. 33 of 1937, as a result of which the aforesaid preliminary and final decrees were passed. One Krishna Bahadur Singh was the owner of the Amnaur estate, and on his death there was a scramble for possession of his estate by Tinkauri Singh and one Tejpertap Singh. This dispute resulted in Title Suit No. 92 of 1928. There was a compromise between these rival claimants whereby it was recognised that 8 annas share in the said estate belonged to Tejpertap Singh and the other 8 annas to Tinkauri Singh.

[17] The appellants obtained a decree in a money suit against Tejpertap and his heirs, and in execution of the said decree purchased at the court sale on 29th April 1938, certain properties belonging to them. The sale was confirmed on 17th January 1939. Some of the properties purchased at the sale are mentioned in the mortgage bond in question and the appellants had it stated in the sale proclamation that these properties were subject to the encumbrance arising out of the mortgage bond in question.

[18] The appellants made Tejpertap's heirs defendants 2 to 5 in the Mortgage Suit No. 33 of 1937 on the ground that they were subsequent transferees of Tinkauri Singh. These defendants contended that they were unnecessary parties to the suit and that there could be no mortgage-decree against them as the properties which Tinkauri Singh purported to mortgage by the mortgage bond in question belonged to them, and that they were not subsequent transferees. It was conceded before the Subordinate Judge that the mortgage bond in question was not confined to the properties in which Tinkauri Singh got a share under the compromise but, extended also to properties wholly allotted to the heirs of Tejpertap. In the mortgage suit, however, it was not shown to the Subordinate Judge what were the properties allotted to the heirs of Tejpertap. In the circumstances, he held that it would be better to leave the question open in the suit as involving a question of paramount title as between the respondent Deolachan Kuer, defendant 1, and the heirs of Tejpertap, defendants 2 to 5. He then held as follows :

"'. . . . And these defendants 2 to 5 not being transferees from Tinkauri Singh but claiming independently of him and adversely to him must be held to have set up a title paramount to that of the mortgagor and would not accordingly appear to be necessary parties to the suit."

He accordingly dismissed the mortgage suit filed by the appellants as against the heirs of Tejpertap but decreed the suit as against Deolachan Kuer, and the aforesaid preliminary decree and the final decree followed in consequence of his decision.

[19] The argument on behalf of the respondent is to the effect that the appellants had purchased the equity of redemption when they sold the properties of Tejpertap Singh having notified that the sale was subject to their encumbrance on the mortgage bond in question. This argument assumes that Tejpertap Singh was a subsequent transferee, and that Tinkauri Singh had the right to mortgage all the properties mentioned in the mortgage bond in question. To accede to the submissions made on behalf of the respondent, which have been set out in the judgment of my learned brother, it would be necessary to hold that an executing Court can go behind the final decree in the Mortgage Suit No. 33 of 1937 as well as the findings of the Subordinate Judge in that suit to the effect that Tejpertap's heirs were not transferees of Tinkauri Singh, and that they must be held to have set up a paramount title to that of Tinkauri Singh. I am clearly of the opinion that it is not open to an executing Court to go behind a final decree or to question the findings arrived at in the suit on which the final decree is based. Such a matter does not relate to the execution, discharge or satisfaction of the decree. The right of contribution can, if a cause has arisen for the same, be enforced in a regular suit and it would be unfortunate indeed to hold that a complicated question such as the right of Tinkauri Singh to mortgage all the properties mentioned in the mortgage bond in question should be allowed to be raised in execution proceedings particularly in view of the findings of the Subordinate Judge which have already been stated.

[20] For these additional reasons I agree with the view taken by my learned brother and direct that the appeal must be allowed with costs, and the case remanded to the learned Subordinate Judge to proceed with the execution in due course of law.

[21] The cross-objection by the respondents I would dismiss as, in my opinion, it is without merit. I agree with the view taken by the learned Subordinate Judge.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 215** *[C. N. 78.]*

MANOHAR LALL AND SINHA JJ.

*Ramsewak Singh — Plaintiff—Appellant* v. *Ramaprasad Singh and others—Defendants —Respondents.*

A. F. O. O. No. 401 of 1943, Decided on 20-12-1945, from order of Addl. Sub-Judge, Gaya, D/- 10-7-1943.

**(a) Hindu law—Partition — Separation in estate —How effected — Filing of plaint, effects separation.**

In Hindu law it is not necessary that there should be a formal document executed by the parties concerned in order to effect a separation in estate. It is only necessary that one of the coparceners should clearly and unequivocally intimate to the other coparceners his desire to sever himself from the others and the consent of the other coparceners is wholly immaterial. The filing of a plaint unless subsequently withdrawn or of a written statement or giving of a notice to other coparceners by a coparcener that he desires to be separate from the rest of them is enough to effect separation in estate: 3 A.I.R. 1916 P. C. 104, *Rel. on* ; 2 I. T. C. 381 (Mad.), *Ref.* [Para 3a]

**(b) Hindu law—Joint family—Father—Powers of — Son's liability for act of father in capacity of manager — Father referring partition to arbitration**

—Award, if otherwise valid, is binding on sons not parties to it.

It is competent to the father of a joint Hindu family in his capacity of the managing member of the family to refer to arbitration, the partition of the joint family property and the award made on such a reference if in other respects valid, is binding on the sons: 16 All. 231, *Foll.*; 8 A. I. R. 1921 Lah. 34, 14 A. I. R. 1927 Lah. 362, 27 A.I.R. 1940 Lah. 73 and 1 A. I. R. 1914 P. C. 136, *Rel. on* ; 5 A. I. R. 1918 Pat. 132, *Disting.* [Para 4]

(c) Arbitration Act (1940), S. 30—Award — Validity—Proof—Documents not incorporated in award cannot be looked into to see whether award was vitiated.

An award in order to be vitiated must be illegal on the face of it. But it cannot be sought to be made so to appear by reference to documents which are not incorporated either directly or indirectly into the award : 10 A. I. R. 1923 P. C. 66, *Rel. on.* [Para 7]

*Cases referred* :—

1. ('16) 43 I. A. 151 : 43 Cal. 1031 : 3 A. I. R. 1916 P. C. 104 : 12 N. L. R. 113 : 37 I. C. 321 (P.C.), Girja Bai v. Sadashiv Dhundiraj.
2. ('27) 2 I. T. C. 381 (Mad.), Kannapa Chettiar v. Commr. of Income-tax, Madras.
3. ('94) 16 All. 231, Jagan Nath v. Mannu Lal.
4. ('21) 2 Lah. 114 : 8 A. I. R. 1921 Lah. 34 : 61 I. C. 628, Dwarka Das v. Krishan Kishore.
5. ('27) 8 Lah. 693 : 14 A. I. R. 1927 Lah. 362 : 104 I. C. 202, Guran Ditta v. Pokhar Ram.
6. ('40) I. L. R. (1940) 21 Lah. 599 : 27 A. I. R. 1940 Lah. 73 : 188 I C. 493, Kanshi Ram v. Harnam Das.
7. ('14) 36 All. 383 : 1 A. I. R 1914 P. C. 136 : 41 I. A. 216 : 24 I. C. 504 (P.C.), Sheo Shankar Ram v. Jadoo Kunwar.
8. ('18) 48 I.C. 953 : 5 A. I. R. 1918 Pat. 132, Chhotey Lal v. Mt. Madho Bibi.
9. ('23) 50 I. A. 324 : 10 A. I. R. 1923 P. C. 66 : 47 Bom. 578 : 73 I. C. 436 (P.C.), Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd.

*Lalnarayan Sinha and Shambhu Prasad Singh* — for Appellant.

*Mahabir Prasad, Sarjoo Prasad and S. N. Sinha* —for Respondents.

**Sinha J.**—This appeal is directed against the order of the learned Additional Subordinate Judge of Gaya in a proceeding for filing an award, and making it a decree of the Court. The plaintiff, who is the appellant in this Court, filed the plaint on the allegations that he and the sole defendant (as the suit was constituted on the original plaint) were at one time members of a joint Hindu family; that there were differences between the brothers on the question of liquidation of debts and other matters relating to the joint family properties, which necessitated reference of their disputes to the arbitration of three persons, Babu Nand Kumar Singh, Babu Ram Pukar Singh and Babu Jirjodhan Prasad Singh, the first two of whom happened to be relatives of either both the parties or one of them; that in pursuance of the decision of the parties to have their differences settled by the aforesaid persons they entered into a registered agreement called the panchnama (Ex. 1) on 6-5-1940—the appellant was the second party and the defendant was the first party in that deed, which was executed in favour of the three persons aforesaid; that the parties had separated in estate before the execution of the deed aforesaid though there had been no division of their properties by metes and bounds; that the plaintiff, soon after the separation, had been functioning as the karta of his branch of the family, and similarly the defendant as the karta of his branch of the family; that the arbitrators aforesaid, after considering the case of the parties, and the documents and evidence adduced before them, gave their award and divided the common properties into two parts for the two branches of the family; that those debts, which remained outstanding against the family, after the application of Rs. 20,000 raised by execution of the sale deed dated 13-9-1940, in respect of village Ratanpura, were divided between the two branches of the family by the arbitrators; that as the arbitrators put off the registration of the award given by them in spite of the repeated demands of the plaintiff, he had to apply for compulsory registration of the award, and the proceeding was pending before the Sub-Registrar of Aurangabad. As the defendant was not prepared to abide by the award of the arbitrators, the plaintiff had to file the application in order that the award might be made a decree of the Court. The suit was filed on 27-10-1941, though the award was signed by two of the arbitrators namely, Ram Pukar Singh and Jirjodhan Singh on 29-3-1941, and by the remaining arbitrator Nand Kumar Singh on 4-4-1941.

[2] Defendant 1 filed a written statement contending that it was not a fact that he was for some time separate from the plaintiff; that he was never the karta of his branch of the family; that the parties still continued to be members of the joint Mitakshara Hindu family; that he executed the Panchnama (Ex. 1) in the hope that the arbitrators would effect a fair and equitable partition of the joint family estates; that the arbitrators acted most perfunctorily, and without any proper material; that Babu Rama Pukar Singh, who is related to the plaintiff, brought the other two punchas into his collusion, and made the most inequitable partition as a result of which the defendant's portion of the properties would yield an income much less than his half share in the family property; that the arbitrators did not divide all the properties which were joint between the parties. He also contended that he had adult sons who were necessary parties to the suit. It appears that the two sons of the sole defendant were added as defendants 2 and 3 on their own application, and not at the instance of the plaintiff. They filed a separate written statement on 17-3-1943, sup-

porting their father's case that there was no separation between the plaintiff's and the defendant's branches of the family. They also alleged that defendant 1 had grown old not being less than 70 years of age, and therefore unable to look after the zamindari affairs, and that he was a man of very obliging disposition; that the defendants, who were adults being aged 37 and 30 respectively, were looking after the kashtkari and zamindari business along with the plaintiff and his sons who also are adult; that the plaintiff never informed these defendants about the proposal of having the properties divided by the arbitrators, and that as a matter of fact the plaintiff dishonestly prevailed upon defendant 1 to have the former's relations and creatures as punches; that these defendants had no knowledge about the proposed arbitration, and that they would not have consented to the appointment of these punches who were actually selected as arbitrators; that defendant 1 had no authority in law to agree to the appointment of certain arbitrators to divide the ancestral properties without their consent; that on that account the division of the properties made by the arbitrators was not binding on them; that the punches aforesaid never took the trouble of ascertaining all the family properties moveable and immovable, and that they never held any sittings, and on that account also their award was vitiated; that the punches have not divided certain moveables which they had been called upon to do; that no allotment paper had ever been furnished to defendant 1; that the award was one-sided, and the allotment made by them was so inequitable and unjust that the income of the properties allotted to the plaintiff is much in excess of that of the properties allotted to the defendant, and finally, that the arbitrators were guilty of misconduct inasmuch as their proceedings were wholly irregular, and they were negligent in the discharge of their duties. They also averred that defendant 1 had not executed the reference to arbitration (the panchnama) as karta of his branch of the family. It may be noted at this stage that in none of the two written statements filed one by defendant 1 and the other by defendants 2 and 3 was it stated specifically that the plaintiff was the karta of the family, nor has it been denied specifically that before the separation between the two branches of the family as alleged by the plaintiff defendant 1 was the karta of the family being the eldest member.

[2a] Hence the two principal questions to be determined in this appeal are: (1) was the reference to arbitration invalid on account of the fact that the sons of defendant 1 did not join in the agreement appointing the arbitrators and (2) whether the award is bad either on account of the misconduct of the arbitrators or because it is illegal on the face of it.

[3] On the first question, the reference to arbitration by the two brothers, plaintiff and defendant 1 would be valid and binding on the two branches of the family only if they acted in their capacity of leading members of their respective families. Hence, it must first be determined whether the joint family of the two brothers had at any time before the reference been separated into two branches as alleged by the plaintiff. The learned Additional Subordinate Judge appears to have taken the view that there was no such separation. In my opinion, this part of the judgment of the learned Additional Subordinate Judge is vitiated by a confusion between the two distinct ideas, namely, separation in estate and actual partition by metes and bounds. In his discussion of this question, the learned Additional Subordinate Judge has omitted to consider that there may not have been a division by metes and bounds, and still the two branches of the family may be said to have separated in estate. The learned Additional Subordinate Judge has criticised the oral evidence adduced on behalf of the plaintiff in support of his allegations that the two branches had separated. It is not always an easy matter to determine the exact point of time when members of a joint family can be said to have become separate in state unless this is done in pursuance of a formally drawn up document. In this case there is no such document but the facts and circumstances brought out in the documentary evidence adduced by the parties, in my opinion, clearly point to the conclusion that the two brothers had become separate in state with the result that the plaintiff became the head of his family and defendant 1 of his own. From Exs. B and B1 it would appear that the plaintiff gave evidence in Court in June, and July 1939, in two suits, in which he was one of the defendants, for realising money debts incurred by the defendant 1 and some by the plaintiff himself. The suits had been instituted for realisation of debts incurred by defendant 1 as the karta of the family before 1938. As the suits had been instituted in that year the debts might have been incurred, though it is not clear from the evidence, before 1342, Fs. corresponding roughly to 1935, inasmuch as the plaintiff in this case who was one of the defendants in those cases pleaded separation since 1342 Fs. apparently with the view to avoiding liability for debts incurred by his brother, defendant 1.

[3a] In those cases as it appears from the judgments Exs. F and F 1, the Court held that the brothers were not separate. This decision appears to have been based on the ground that even

after 1342 Fs. they had been executing ijara and other deeds for payments of debts jointly. The judgments aforesaid can be said to have decided that the then defendant's case of separation in 1342 Fs had not been established. In those cases the Courts were not concerned with deciding the status of the family after the date of the debts, which were the subject matter of these suits. It must be noted that the plaintiff, as one of the defendants in these cases, had filed the written statement in Court alleging separation from the defendant, his brother. Now, what is the effect of the written statement filed in 1938 or 1939 (the exact date not being known)? In my opinion, from the date of the filing of the written statement the two brothers must be deemed to be separate in estate, if indeed they were not separate from before that date. In Hindu law it is not necessary that there should be a formal document executed by the parties concerned in order to effect a separation in estate. The law was clearly laid down by their Lordships of the Judicial Committee in 43 I. A. 151 : 43 Cal. 1031.[1] In order to effect a separation in estate it is only necessary that one of the coparceners should clearly and unequivocally intimate to the other coparceners his desire to sever himself from the others, and the consent of the other coparcener is wholly immaterial. The filing of a plaint unless subsequently withdrawn, or of a written statement, or giving of a notice to the other coparceners by a coparcener that he desires to be separate from the rest of them is enough to effect separation in estate. The learned Additional Subordinate Judge has laid some stress on the fact that in the judgments aforesaid given against the plaintiff in those money suits the Court held in July 1939, that the two brothers were joint, but those judgments are conclusive of the matter only with reference to the dates of the transactions which were in issue in those cases. It has been held by a Full Bench of the Madras High Court in 2 I. T. C. 381[2] that where the coparceners had filed separate sworn statements before the Income-tax Officer to the effect that they had become divided in status 10 years ago but the Income-tax authorities held those declarations to be false, and made an assessment on the basis that they were joint undivided family, that at any rate on the date when the statements were made, the brothers had become divided in status by reason of their declarations aforesaid, though it was open to the Income-tax authorities to find on the facts that the statements, as regards separation at any time before the declarations had been made had not been established. Hence at any rate, the two brothers must be deemed to have become separate in estate since July 1939. In July 1939 the plaintiff had deposed that though the zamindari was still joint their cultivation was separate and they had been messing separately. In my opinion, that statement seems to be correct inasmuch as it is common experience that in a joint Hindu Mitakshara family separation amongst the coparceners ordinarily does not take place as a result of a particular act. Generally speaking there are differences amongst the coparceners on the question of the management of the property, or the incurring of expenses in relation to the needs of a particular coparcener, or his issue, or because the leading member happens to be dissipating family assets, and the other members resent such a conduct of the karta of the family. The coparceners begin by separation in mess which necessitates owning of separate moveables eitheir by division or by arrangement. If it is a cultivating family, separate messing necessitates separate cultivation which itself leads to division of agriculture lands. In Zamindar families Zamindari property may not be divided and still the different branches of the family may become separate in estate remaining content with the division of the income therefrom. In the present case, it appears that the family carries on the business of zamindari and cultivation. There is no doubt that, as appears from the judgment Ex. F of the first Subordinate Judge at Gaya delivered in July 1939 that the subject-matter of the suit was a number of handnotes most of them executed by the elder brother (defendant 1) and one by the younger brother (the plaintiff), and one by both of them jointly. It would appear therefrom that first the authority of the elder brother to incur debts was unchallenged, and the creditors would be willing to lend money to him alone. Subsequently, apparently, on account of the differences between the two branches, the creditors made both the brothers execute the promissory notes, and the last transaction was by the younger brother alone. That judgment itself is evidence of the fact that there were differences between the two brothers over the payment of debts. Such differences are mentioned in the Panchnama Ex. 1 itself. As a matter of fact, those differences over the management of zamindari and "oral and documentary monetary transactions" were the occasions for the reference to arbitration. The arbitrators had been called upon to adjudicate upon the division of the properties, and as also upon the debts due from the family. In the face of these recitals by the two brothers it is a little difficult to appreciate how the learned Additional Subordinate Judge came to the conclusion that there was never any separation in the family, and that it was still joint. It is common experience that coparceners do not

go to the length of appointing arbitrators to divide their properties movables and immovable unless there has been a separation in estate for sometime, and the parties were not agreeable to effect partition amicably by metes and bounds. The learned Additional Subordinate Judge also held that the plaintiff (the younger brother) was the karta of the family because he deposed (see EX. B) that he was the karta. The learned Additional Subordinate Judge has fallen into this error by failing to appreciate the inconsistency in his findings. The plaintiff was then claiming to be karta because he was alleging separation, and was apparently attempting to avoid debts incurred by his elder brother, who in the ordinary course would be karta of the family so long as the two brothers continued to be joint. I have advisably made no reference to the oral evidence because that must be characterised as was done by the learned Additional Subordinate Judge himself as interested evidence, but the facts and circumstances of this case make it absolutely clear that the two brothers were separate in estate at any rate at the time when they entered into the agreement (EX. 1) to refer their disputes to arbitration. That being so, it must be held that the two brothers representing their respective branches of the family were competent to enter into the agreement aforesaid.

[4] The question now is whether this agreement is binding upon the sons of the plaintiff who are not parties to the suit, and the sons of defendant who have intervened on their own account and the grandsons who are not parties to the suit, and are admittedly minors. In the leading case in 16 ALL. 231[3] Edge C. J. and Banerjee J. have held that it is competent to the father of a joint Hindu family in his capacity of the managing member of the family to refer to arbitration, the partition of the joint family property, and the award made on such a reference if in other respects valid, is binding on the sons. So far as I know this case has never been dissented from, and has been consistently followed by the Lahore High Court in 2 Lah. 114,[4] 8 Lah. 693[5] and 21 Lah. 599.[6] In 36 ALL. 383[7] their Lordships of the Judicial Committee have made the following observations and have lent support to the proposition that in a matter like this a father as the leading member of the family effectively represents his sons and grandsons:

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the Managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."

Though that case related to a foreclosure action the principle equally applies to a matter in which the whole family is interested, and such an act of the father, apparently for the benefit of the family, as a reference to arbitration, is meant to avoid expensive litigation. The learned Additional Subordinate Judge has made reference to the case in 48 I. C. 953[8] decided by a Division Bench of this Court in which the headnote runs as follows:

"Where the question of the partition of the family properties of a joint Hindu family is referred to arbitration and some of the members of the joint family are not party to the reference, the award given in pursuance of such reference partitioning the family property is invalid and cannot be filed. . . ."

In that case it would appear that some member admittedly interested in the joint family property had not joined in the reference, and in the view taken in that case was not represented by any other member. It does not appear from the report that the particular member was the son of any of the parties who had joined in the reference. That case, in my opinion, cannot be taken as an authority for the proposition that the father of a joint Hindu Mitakshara family is not competent as the karta of the family to make a valid reference to arbitration. Hence that case is of no assistance to the defendant-respondents in this case. In view of these considerations, it must be held that the two branches of the family were fully represented in the matter of the reference to arbitration, and that if the award of the arbitrators is not otherwise vitiated, it is binding upon the two families.

[5] The next question that arises for consideration is whether the award given by the arbitrators is vitiated. The first branch of this question relates to the alleged misconduct of the arbitrators. It is said that they did not discharge their duties properly and diligently, and, that as a matter of fact, they are guilty of gross laches and carelessness. The learned Additional Subordinate Judge has given effect to this contention of the defendant-respondents. He has also accepted as proved the defendant's allegations that the award is on the face of it illegal inasmuch as the property of the value of more than Rs. 5000 a year has been allotted to the share of the plaintiff's branch of the family and that allotted to the defendants' branch of the family cannot yield more than roughly Rs. 4000 a year. It has to be examined as to whether these contentions are well founded, and whether the learned Additional Subordinate Judge's decision on this part of the case is correct in law and in fact. It is said that the arbitrators did not act diligently inasmuch as they did not prepare any raibandi and divide the properties after properly valuing them. The simple answer to this contention is that admittedly the arbitrators proceeded on the basis of the raibandi

of the year 1342 Fs. which had been prepared for the purpose of partition of the family properties between the parties to this litigation on the one hand and their collaterals on the other. It was suggested that statements of valuation prepared in or about the year 1935 could not be the sure basis for partition to be effected in 1940 or 1941. I fail to see any point in this contention for the simple reason that the same basis of valuation has been taken for all the properties. It has not been suggested, far less proved, that any particular property has appreciated in value to a much larger extent than the other items of properties to be divided between the parties. The second contention relating to the comparative value of the two allotments is a more serious one, and if made out has certainly the effect of vitiating the award. In this connection it is necessary to narrate certain events which took place between the date of the reference to arbitration and the date of the award itself. Defendant 1 it was alleged, in this capacity of the karta of the family had incurred certain debts, and the plaintiff was questioning the binding nature of those debts so far as his branch of the family was concerned. One of the properties belonging to this family was village Ratanpura. It had been agreed to be sold for Rs. 20,000 in order to liquidate the outstanding debts. It appears that the plaintiff was insisting upon the partition being effected as expeditiously as possible, and perhaps the defendant's branch of the family was not interested in having the partition expedited. Hence, the plaintiff urged before the arbitrators that unless they divided the zamindari properties by metes and bounds he would not join in the execution of the sale deed. But the intending purchaser would not take the sale deed from only one of the two brothers. Admittedly, therefore, came into existence the document which has been marked Ex. 4 on behalf of the plaintiff. This document has been described by the learned Additional Subordinate Judge as the draft award, but it can more properly be described as an interim award. This document, which is mostly admitted (I will presently show in what respect it is not admitted), shows that ten items of zamindari properties had been allotted to the plaintiff's share. The net income of these properties is shown roughly as Rs. 5000. This document is based upon the raibandi of 1342 Fs. as aforesaid. It is, in my opinion, the most important document in the case as it clinches the matter in favour of the plaintiff-appellant. It contains the specific statement signed both by the plaintiff and defendant 1 "the allotment of shares is accepted and admitted," which also bears the separate but identical statement signed by each arbitrator on 13th September 1940, "the allotment of shares took place in my presence and the share was allotted to Ramsevak Singh." It would appear from this document that a similar allotment was prepared in respect of the properties given to the share of Rama Prasad Singh, defendant 1. But curiously enough the defendants alleged that there was no such allotment prepared, and that this allotment also was not complete inasmuch as the details of the item 10th of property in respect of shares and net income as also aggregate of all the ten items had not been made out when this document was executed on 13th September 1940. I have quoted the exact statement made by the parties as also by the arbitrators to show that this suggestion made on behalf of the defendants is not acceptable. The defendants have not produced the counter part of this document which, in my opinion, was as a matter of fact, prepared and, as stated by the arbitrators, examined on behalf of the plaintiff, made over to defendant 1.

[6] As I have observed above, the interim award was followed later on by a complete award in which not only the zamindary property but houses, debts and moveable properties were shown to have been allotted to the two branches of the family. This award was signed by two of the arbitrators, namely Ram Pukar Singh and Jirjodhan Prasad Singh on 29th March 1941 and by the remaining arbitrator Babu Nandkumar Singh on 4th April 1941. It was presented for registration on 29th July the same year, and execution was admitted by the first two arbitrators aforesaid but refused by Nandkumar Singh. Nandkumar has been examined on behalf of the defendant, and his case is that he along with the other arbitrators were negligent in the discharge of their duties as they did not prepare the Raibandi, that the document (Ex. 4) was drawn up for the benefit of the plaintiff on his insistence without the proper materials being there, and that all papers relating to arbitration were kept with Rama Prasad Singh, and he had in his possession only the Raibandi which he produced and was marked as Ex. C. Exhibit C is a document which purported to be handed over by the parties to the arbitrators for the purposes of effecting the partition. It contained statements of assets as prepared in 1342 Fs. for the purpose of partition amongst the cosharers of the parties to this litigation. On the other hand, the other two arbitrators have been examined on behalf of the plaintiff, and their statement is that all papers were kept with Nandkumar Singh who took an active part in the arbitration proceedings and that Ex. C was not that document inasmuch as the document made over by the parties bore the signatures not only of the parties but also of the

arbitrators. Exhibit C does not bear any such signature. Nandkumar Singh also supports the defendants' case that EX. 4 as originally drawn up did not contain the details of 10th item of property to be allotted to the plaintiff nor had all the items been totalled up. Their suggestion is that EX. 4 had been tampered with by the plaintiff or by the arbitrators at his instance. I am not prepared to accept this most improbable story. If, as it is admitted by both parties, the plaintiff insisted upon the allotment of zamindari property between the two branches, there is no reason why the two allotments should not have been completed then and there, specially when the Raibandi of 1342 was ready at hand in front of the arbitrators. In my opinion, this story of tampering with EX. 4 and that there was no counter-part of the same meant for the defendant's allotments has been invented by the defendants in order to make out a false case that the value of the properties allotted to the defendant's share was much less than that of the properties allotted to the plaintiff's share. There is no reason to support such a suggestion. Nand Kumar Singh is admittedly related to the plaintiff as also to the defendants. He is the brother-in-law of both the plaintiff and defendant 1. Both his sisters are dead, but whereas his sister married to the plaintiff left no issue, his sister married to defendant 1 left some children including Raghubir, one of the defendants. Hence, in my opinion, the learned Additional Subordinate Judge was not right in observing that Nand Kumar Singh was equally interested in both the branches of the family being equally related. He has lost sight of the fact that whereas his relationship with the plaintiffs has ceased by the death of that issueless sister, his relationship with the defendant's branch of the family still continues because she left behind her some children. In my opinion, the said arbitrator Nand Kumar Singh has deposed in Court in full support of the defendants' case because he is interested in favour of the defendants. No sufficient ground has been made out by Nand Kumar Singh to hold that the award was vitiated by any remissness or negligence on the part of the arbitrators. Nand Kumar Singh has not given any sufficient explanation why he signed the award if in his opinion it was neither complete nor just and equitable to both the parties to the reference to arbitration. In my opinion, Nand Kumar Singh was prevailed upon later on, after he had signed the award, to withdraw his support from the same when it was presented for registration as the defendants found that the properties allotted to their share were not what they would have liked to possess as compared to those allotted to the other branch. But no partition, however, diligently and honestly effected, can satisfy all the parties, apparently because no allotment can be perfect in the sense that all the shares would be absolutely of the same value. From what I have said above it follows that the defendants have failed to make out that the arbitrators were either of incompetence, or negligence, or that the award on the face of it was illegal in the sense that the two branches of the family had not been given properties of equal value. It was also suggested that the arbitrators did not make a separate valuation in respect of the bakasht lands in the different villages to be partitioned. It is enough to point out that the parties had agreed to proceed on the basis of the valuation made in 1934-35. It has been conceded on behalf of the defendants that raibandi of 1342 Fasli does not take account of the bakasht lands separately. I do not see any reason why it should have been necessary for the arbitrators to value the bakasht lands separately in this partition when admittedly it was not done in the partition of 1935 between these parties on the one hand and their collaterals on the other hand. The learned Additional Subordinate Judge has characterised the evidence of the two arbitrators examined on behalf of the plaintiff as unreliable and has preferred the evidence of Nand Kumar Singh to their evidence. Though Ram Pukar Singh is a relation of the plaintiff Jirjodhan Prasad Singh the third arbitrator is not related to either party and I take it that he was appointed as the third arbitrator to maintain the balance between the two others who are more or less interested in one or the other party. That third arbitrator has supported the plaintiff's case and corroborated the evidence of Ram Pukar. As the evidence of the two arbitrators deposing on behalf of the plaintiff is supported by the admitted document (EX. 4), I would prefer to act upon their testimony, and would reject the testimony of Nand Kumar Singh as unacceptable, running as it does to counter the tenor of the admitted document (EX 4).

[7] There is another serious difficulty in the way of the defendants-respondents. The award in order to be vitiated must be illegal on the face of it, but it is sought to be made so to appear by reference to EXS. C and C1 which are documents not incorporated either directly or indirectly into the award. In my opinion, these extraneous matters sought to be proved by these documents EXS. C and C1 cannot be taken into account in judging the validity of the award. In this connection the decision of their Lordships of the Judicial Committee in 50 I. A. 324[9] may be referred to with the advantage. In that case their Lordships have held that an award of arbitration can be set aside on the ground of

error of law on the face of the award only when in the award or in a document incorporated with it, as for instance, a note appended by the arbitrator stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous. In that case the terms of a contract which had not been incorporated in the award were sought to be referred to with a view to showing that the award was illegal on the face of it, and their Lordships of the Judicial Committee repelled that contention. For the reasons aforesaid, it must be held that the learned Additional Subordinate Judge was not right in his view that the arbitrators were guilty of misconduct, or that the award was illegal on the face of it. It may be that the defendants have good reasons to be dissatisfied with the decision of the arbitrators. The arbitrators may have gone wrong in their estimate of the value of the properties or in their allotments, but that is no ground, in the absence of proof of misconduct, to set aside the award. It may be mentioned by the way that the plaintiff appellant was agreeable to exchanging his allotment with that of the defendants, but that proposal though accepted by the defendants could not be given effect to as portions of those properties has been sold by the defendants, and the parties were not agreed as to substitutes thereof.

[8] In my opinion, the learned Additional Subordinate Judge has misdirected himself on both the points in controversy between the parties. His judgment is both erroneous on facts and in law. The appeal must accordingly be allowed, the orders passed by the Court below set aside, and the award filed in Court should be made a decree of the Court. The appellant is entitled to his costs both in this Court and in the Court below.

**Manohar Lall J.**—I agree.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 222** *[C. N. 79.]*

SINHA AND DALZIEL JJ.

*Sahendra Singh—Petitioner* v. *Emperor.*

Criminal Revn. No. 262 of 1946, Decided on 11-12-1946, from order of Addl. Sessions Judge, Shahabad, Arrah, D/- 7-1-1946.

**Arms Act (1878), S. 19 (f) — "Possession and control" means conscious possession and actual control—*Mens rea* is essential for offence — Joint occupation of house — S. 106, Evidence Act (1872), if can be applied and onus cast upon occupiers to establish innocence—Evidence Act (1872), S. 106.**

The words "possession and control" in S. 19 (f) mean something more than mere constructive or legal possession and control. Possession and control required to constitute offence under S. 19 (f) must mean conscious possession and actual control and as under this section mere possession of incriminating articles constitutes serious criminal offence, there must be *mens rea* of guilty knowledge before a person can be convicted or such possession. [Para 3]

Merely because an incriminating article is found in a house occupied by a number of persons, the onus cannot be thrown either under S. 106, Evidence Act, or any other provision of law upon these persons to establish their innocence, unless the occupiers of the house are shown to have been aware of the existence of the article in the house : 19 A. I. R. 1932 All. 441, *Expl.*; 31 A.I.R. 1944 Lah. 339 (F.B.), *Rel. on.* [Para 3]

Annotation : ('46-Man.), Arms Act, S. 19, N. 10.

*Cases referred* :—

1. ('44) 31 A.I.R. 1944 Lah. 339 : I. L. R. (1945) Lah. 137 : 215 I. C. 161 : 46 Cr. L. J. 1 (F.B.), Emperor v. Santa Singh.
2. ('32) 19 A. I. R. 1932 All. 441: 54 All. 411 : 139 I. C. 153 : 33 Cr. L. J. 719, Emperor v. Sikhdar.

*G. P. Das, Harians Kumar and Rameshwar Prasad Sinha*—for Petitioner.

*Government Pleader*—for the Crown.

**Dalziel J.** — This petition has been filed by one Sahendra Singh against his conviction by the learned Subdivisional Magistrate, Sasaram, under S. 19 (f), Arms Act, on which he was sentenced to undergo rigorous imprisonment for nine months, this conviction and sentence having been upheld on appeal by the learned Additional Sessions Judge, Shahabad.

[2] The facts of the case are briefly that one single barrelled muzzle-loading gun was recovered from a room alleged to be in occupation of the petitioner on a search made by the Inspector of Police, Ram Prasad, along with a Sub-Inspector and two witnesses including one Bishwanath Pande who was P. W. 1 in the case. One point of law which has been urged in support of this petition is that the prosecution did not succeed in proving that the gun was in possession or under the control of the petitioner, as it was not shown that he was the only occupant of the room. Admittedly, he was not present at the time of the search. The evidence on which the appellate Court has found possession and control to have been with the petitioner is that of Biswanath Pande, the search witness whom I have just mentioned. This witness deposed in his examination in chief as follows — "I know the accused. He and Ramdas live in the same courtyard east and west of it respectively." It was a room on the eastern side of the courtyard which was searched and the gun was found leaning against a wall in the corner of an anteroom attached to this room. On this basis the prosecution sought to prove the possession and control of the petitioner. In cross-examination, however, the same witness has deposed that "Ramdas Singh, Sahendra Singh (the petitioner) and Bijoy Singh live in the same angan. Bijoy Singh and Sahendra Singh were joint before, but I do not know about the present." In this state of the evidence it is urged by Mr. G. P.

Das on behalf of the petitioner that it cannot be held to have been proved that the petitioner was in possession and control of the gun within the meaning of S. 19 (f).

[3] In my opinion this contention must succeed. The latest ruling in this matter is that reported in A. I. R. 1944 Lah. 339.[1] The learned Additional Sessions Judge appears to have read this ruling as entirely following the earlier ruling reported in A. I. R. 1932 ALL. 441[2] and as being against the defence contention. I have, however, examined that ruling, and find that this is not a correct view. It was held in that case that :

"The words 'possession and control' in S. 19 (f), Arms Act, and S. 5, Explosive Substances Act, mean something more than mere constructive or legal possession and control. Possession and control required to constitute offences under the aforesaid sections must mean conscious possession and actual control, and as under those sections mere possession of incriminating articles constitutes serious criminal offences there must be *mens rea* or guilty knowledge before a person can be convicted of such possession."

It was further held that :

"Exclusive possession or control of any particular person over an incriminating article is not required under S. 19 (f), Arms Act, and S. 5, Explosive Substances Act. The possession or control might well be possession or control of two or more persons. Every case must depend on its particular facts."

It is perhaps on a mere perusal of this part of the placitum that the learned Additional Sessions Judge has come to the conclusion that this ruling goes against the defence in the present case. This, however, is not really so. The question has previously been dealt with in the Allahabad case, A. I. R. 1932 ALL. 441.[2] Dealing with this previous ruling, Harries C. J. remarked that the difficulty (of obtaining convictions where acticles are recovered from premises jointly occupied by a number of persons) confronted Bennet J. in A. I. R. 1932 ALL. 441[2] in which he held that the finding of an unlicensed gun in the house of a joint Hindu family would raise a presumption against all the adult male members who lived in that house that the gun was in their possession and control, and they might one and all be tried on that charge. After discussion of this ruling Harries C. J. goes on :

"However, I am not prepared to hold that where an incriminating article is found in a house occupied by a number of persons, the onus is thrown upon those persons to establish their innocence. Though Bennet J. did not in terms refer to S. 106, Evidence Act, he was, in my view, undoubtedly attempting to apply the provisions of that section to the facts of the case before him. Section 106, Evidence Act, provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Bennet J. appeared to have thought that where an article is found in a house in circumstances in which all the members of the house must have been aware of its existence then the question of its possession and control was a fact especially within the knowledge of all of them and the burden of proving that they were not in such possession and control rested on the various accused."

It is clearly, however, laid down in that Lahore judgment that ordinarily S. 106, Evidence Act, would not apply to cases of this sort. In other words, it would only apply in such circumstances as where to repeat the words just quoted, an article is found in a house in circumstances in which all the members of the house must have been aware of its existence. That is not the position in the present case. The prosecution alleged that the room which was searched belongs to the petitioner, but it has been brought out in evidence that another man, Bijoy Singh, who is the uncle of the petitioner, lives in the same angan. It is also admitted that he and the petitioner were joint at least before, and the witness does not know about their position at present. The presumption would, of course, be that they are still joint. In the circumstances the prosecution has not proved that the petitioner was the only occupant of that room. Moreover, the petitioner was not present at the time, and there is nothing in the evidence to show when he was last in actual occupation of that room. In these circumstances I do not think that the prosecution has fully proved the possession and control of the petitioner. Nor, in my opinion, can the onus be cast upon the accused in this case under S. 106, Evidence Act, or under any other provision of law, to prove that he was not in possession and control of the gun.

[4] For these reasons this petition must be allowed. In the circumstances it is not necessary to deal with the point of law which has been referred to this Division Bench by my brother Bennett J. on the question whether proper sanction was required and was obtained for the prosecution of the petitioner in respect of an offence under S. 19 (f), Arms Act.

[5] I would, therefore, allow this petition, and set aside the conviction and sentence of the petitioner. He ought to be released from his bail forthwith.

**Sinha J.** — I agree.

R.G.D. *Revision allowed.*

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**A. I. R. (35) 1948 Patna 223** *[C. N. 80.]*

MANOHAR LALL AND MEREDITH JJ.

*Ambika Prasad Singh and another* — *Appellants* v. *Laxmi Ahir* — *Respondent.*

Letters Patent Appeal No. 23 of 1945, Decided on 13th December 1946, from judgment of Beevor J., D/- 24th September 1945.

**Bihar Tenancy Act (8 [VIII] of 1885), S. 148A— Rent suit for part of holding is not maintainable —Money decree cannot be passed.**

A suit for rent with regard to part of a holding is not maintainable. In such a suit the landlord is not entitled even to a money decree. Such a suit is no

really in respect of the holding at all but in respect of an alleged different holding which does not in fact exist : 25 A. I. R 1938 Pat. 305, *Foll.*; 25 A.I.R 1938 Pat. 306 (F. B.), *Disting.* [Para 4]

*Cases referred* :—

1. ('38) 17 Pat 451 : 25 A. I. R. 1938 Pat. 306 : 177 I. C. 676 (F B.).
2. ('38) 25 A. I. R. 1938 Pat. 305 : 177 I. C. 529.

*Shambhunath* — for Appellants.

*Tarkeshwar Nath* — for Respondent.

**Meredith J.**—This appeal under the Letters Patent is without merit. It is by the plaintiffs against a decision of Beevor J. and arises out of a suit for realisation of rent for the years 1347 to 1349 Fasli in respect of an alleged holding comprising 3.6 acres of land out of khata No. 16 in village Amaishi Dihra, tauzi No. 4918. The plaintiffs alleged that the rent claimed lands appertained to khewat No. 1/1 of which they were the sixteen annas proprietors by private partition before the survey. The defence was that one Bachu Singh was the sixteen annas proprietor of the rent claimed lands and that the defendant has paid rent for the years in suit to him, and that the suit could not proceed without impleading Bachu Singh and other maliks of khewat No. 1/1. The defendant further contended that his holding was of 6.53 acres with a different annual rental, and the suit brought in respect of a part of the holding was not maintainable.

[2] The trial Court found that the sixteen annas rent of the holding in suit from 1347 up to the first eight annas kist of 1349 was payable to the plaintiffs and Bachu Singh, and the rent of the second eight annas kist of 1349 was payable to the plaintiffs. But as the plaintiffs did not plead separate collection from Bachu Singh, and as the plea of payment to Bachu Singh was accepted in respect of all but the eight annas kist of 1349, it was held that the plaintiffs would be entitled to rent only for the second eight annas kist of 1349. They were, however, not entitled to any decree at all as the plaintiffs' plea that the holding had been split up was not correct, rather the holding of 6.53 acres still existed.

[3] These findings were all confirmed by the learned Additional Subordinate Judge in first appeal.

[4] In second appeal, the sole point taken before Beevor J. was that although the plaintiffs could not get a rent decree, they should nevertheless on the basis of the Full Bench decision in *Jeeu andas Singh* v *Janki Singh* (17 I at 451)[1] get a money decree. The learned Judge rejected this contention. He pointed out that it had been held in a decision of Wort J. in *Ramchander Mahto* v. *Ramoutam Mahton* (A.I.R. 1938 Pat. 305)[2] that a suit for rent for a part of the holding was not maintainable, and in such a suit the landlord was not entitled even to a money decree, because in such a case the suit had not really been brought in respect of the holding at all, but in respect of an alleged different holding which did not in fact exist. Beevor J pointed out that this decision of Wort J. though referred to by the Full Bench was not dissented from, and the decision of the Full Bench was confined to an entirely different class of cases, namely where there were *bona fide* errors or omissions in the description of the holding, or some dispute as to its exact area. Such a case is clearly quite different from a suit based on an allegation that the holding has been split into two separate holdings that allegation being incorrect.

[5] As I have said, there is no merit at all in this appeal, and I would dismiss it with costs.

**Manohar Lall J.**—I agree.

R.G.D. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 224 *[C. N. 81.]*

AGARWALA AG. C. J. AND IMAM J.

*Arabinda Bandhu*—*Appellant* v. *Hargauri Tewari and others* — *Respondents.*

Letters Patent Appeals Nos. 4 and 5 of 1944 Decided on 12-12 1946 from decision of Manohar Lall J., D/- 17-2-1944.

**Bihar Tenancy Act (8 [VIII] of 1885), S. 113 — Scope of – Application for reduction of rent dismissed —Second application, if can be entertained for same purpose — Order of reduction on such application, whether can be challenged in collateral proceedings.**

**Section 113 does not bar the jurisdiction of the Revenue Officer to entertain a second application for reduction of rent on the dismissal of the previous one. What is prohibited is the reduction of rent when that rent has already been settled or reduced in a proceeding under Chap. 10. Therefore, when an application is made to a Revenue Officer for reduction of rent, he has to decide, if the question is raised before him, whether there has already been a settlement or reduction under Chap 10. This is a question which he has jurisdiction to decide, and must, indeed decide if it is raised. If it is not raised before him, his decision is not necessary on that point. But the fact that it is not raised cannot affect the jurisdiction which he has to entertain the application and to decide such questions as legitimately arise on it.**

**Where therefore the landlord did not, in the second application of the tenant for reduction of rent on the dismissal of the first, raise before the Revenue Officer the question whether there had already been a settlement or reduction of the rent under Chap. 10 so as to debar him from making an order for the reduction of rent the order of the Revenue Officer reducing the rent cannot be challenged in a collateral proceeding such as a suit for recovery of rent.** [Para 2]

*G. N. Mukherji* — for Appellants.

*A. C. Roy* — for Respondents.

**Agarwala Ag. C. J.** — These two appeals under the Letters Patent are from the judgment of Manohar Lall J. in the second appeals arising out of two suits for rent instituted by the appellants. The material facts are that on 19-12-1939, the tenant-defendants applied to the Revenue

Officer for reduction of the rent of their holding on the ground specified in cl. (d) of S. 112A, Tenancy Act. The application was dismissed on contest by the landlords. Three days later, they made a second application for reduction of rent on precisely the same grounds. As the result of this application the rent was reduced. The landlords, however, sued to recover at the old rate, and were met by the defence that the rent had been reduced. Their reply to this was that the Revenue Officer had no jurisdiction to reduce the rent in view of the dismissal of the previous application under S. 112A. The appellants rely on S. 113, Tenancy Act, which provides that, when the rent of a tenure or holding has been settled or reduced under Ch. 10, no such rent shall be reduced within a certain specified period save on certain grounds not material to the present appeals.

[2] It is contended that the first order of the Revenue Officer dismissing the application for reduction of rent is a settlement of rent within the meaning of S. 113, and that, consequently, the power of the Revenue Officer to reduce the rent on the second application was barred. It is to be observed, however, that S. 113 does not bar the jurisdiction of the Revenue Officer to entertain a second application for reduction of rent. What is prohibited is the reduction of rent when that rent has already been settled or reduced in a proceeding under Ch. 10. It follows, therefore, that when an application is made to a Revenue Officer for reduction of rent, he has to decide, if the question is raised before him, whether there has already been a settlement or reduction under Ch. 10. There can be no doubt whatsoever that that is a question which he has jurisdiction to decide, and must, indeed, decide if it is raised. If it is not raised before him, his decision is not necessary on that point. But the fact that it is not raised cannot affect the jurisdiction, which he has, to entertain the application and to decide such question as legitimately arise on it. In the present instance, the appellants did not raise before the Revenue Officer the question whether there had already been a settlement or reduction of the rent under Ch. 10 so as to debar him from making an order for the reduction of the rent. The order of the Revenue Officer reducing the rent, therefore, cannot be challenged in this collateral proceeding. The appeals, therefore, fail and must be dismissed with costs, one hearing fee.

**Imam J.**—I agree.

S.C. *Appeals dismissed.*

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1948 P/29 & 30

* **A. I. R. (35) 1948 Patna 226** *[C. N. 82.]*

FULL BENCH

AGARWALA C. J., MANOHAR LALL AND RAMASWAMI JJ.

*Deonandan Singh — Petitioner* v. *Ramlakhan Singh and another—Opposite Party.*

Civil Criminal Revn. No. 360 of 1947, Decided on 18-12-1947, from order of District Judge, Saran, D/- 22-2-1947.

*(a) Criminal P. C. (1898), S. 439—Appellate order passed under S. 476B by civil or revenue Court—Revision application is governed by S. 115, Civil P. C., and not by S. 439, Criminal P. C.

The phrase "any proceeding" in S. 439 must be construed in a manner which is consistent with the scope and object of the statute. It must be construed not in too wide a sense but in the context which points to a proceeding of a definite character, namely, a proceeding before any inferior criminal Court. A civil Court acting under S. 476 does not exercise any criminal jurisdiction. So construed, an application in revision against an appellate order passed by a civil or revenue Court under S. 476B is governed not by S. 439, Criminal P. C., but by S. 115, Civil P. C.: 8 A.I.R. 1921 Pat. 94, *Approved*; 21 A.I.R. 1934 Mad. 52 (F.B.) *Held not authoritative*; *Case law reviewed.* [Paras 7, 9, 16]

Annotation : ('46-Com.) Cr. P. C. S. 476A, N. 13.

*(b) Criminal P. C. (1898), S. 476B— Costs—Civil Court has no power to award costs in appeal under S. 476B—S. 35, Civil P. C., does not apply.

The civil Court has no power to award costs in an appeal under S. 476B. [Para 17]

Section 35, Civil P. C., does not apply to an appeal under S. 476B, Criminal P. C.: 34 A.I.R. 1947 Pat. 138, *Approved*; 34 A. I. R. 1947 Pat. 106, *Disapproved.* [Para 17]

Per *Manohar Lall J.* — The only section which empowers the civil Court to grant costs is S. 35, Civil P. C., but that power is limited to suits and proceedings in the nature of suits. A proceeding to consider whether parties to a suit should or should not be put upon trial under the Indian Penal Code is neither a suit nor incidental to a suit, although the offence may be alleged to have been committed in the course of the hearing of a suit or an execution proceeding. [Para 25]

Annotation : ('46-Com.) Cr. P. C. S. 476, N. 24.

(c) Interpretation of statutes—Act creating new jurisdiction must be construed strictly.

An enactment which creates or appears to create new jurisdiction must be construed strictly : (1877) 6 Ch. D. 297 and (1877) 2 Q. B. D. 179, *Foll.* [Para 10]

Annotation : ('44-Com.) Civil P. C., Preamble N. 7, Pt. 65.

(d) Interpretation of statutes — Construction avoiding inconsistency is to be preferred.

The Court should lean to the interpretation which would avoid inconsistency between the different parts of the statute : 8 A. I. R. 1921 P. C. 240, *Foll.* [Para 23]

Annotation : ('44-Com.) Civil P. C., Preamble N. 7 Pt. 34.

*Cases referred* :—

1. ('21) 6 Pat. L. J. 178 : 8 A. I. R. 1921 Pat. 94 : 22 Cr. L. J. 403 : 61 I. C. 643, Raktu Singh v. Emperor.
2. ('13) 40 Cal. 477 : 14 Cr. L. J. 197 : 19 I. C. 197 (F. B.), Emperor v. Har Prasad Das.
3. ('38) I. L. R.(1938) Bom. 331 : 25 A.I.R. 1938 Bom. 225 : 39 Cr. L. J. 495 : 174 I. C. 780 (F B.), Emperor v. Bhatu Sadu.

**4.** ('32) 13 Lah. 342 : 18 A.I.R. 1931 Lah. 761: 33 Cr. L. J. 178 : 135 I. C. 594 (F.B.), Dhanpat Rai v. Balak Ram.
**5.** (1595) 3 Co. Ref 59, Dincoln College Case.
**6.** (1887) 2 Q B. 144 : 36 L.J.Q.B. 81 : 15 L. T. 466 : 15 W. R. 345, Rein v. Lane.
**7.** (1890) 14 A. C. 493 : 59 L. J. Q. B. 53 : 61 L. T. 518 : 38 W. R. 289, Colquhoun v. Brooks.
**8.** (1877) 6 Ch. D. 297 : 46 L J Ch. 838 : 37 L. T. 419 : 25 W. R. 793, Flower v. Lloyed.
**9.** (1877) 2 Q. B. D. 179 : 46 L. J. M. C. 183 : 36 L. T. 663, Diss. Urban Sanitary Authority v Aldrich.
**10.** ('04) 26 All. 249 : 1 Cr. L. J. 73 (F. B.), In the matter of Bhup Kunwar.
**11.** ('06) 28 All. 554 : 3 Cr. L. J. 400 (F.B.), Salig Ram v. Ramji Lal.
**12.** ('40) I. L. R. (1940) Mad. 762 : 27 A. I. R. 1940 Mad. 465 : 41 Cr. L. J. 769 : 189 I. C. 630 (F. B.), Kumaravel Nadar v. Shanmuga Nadar.
**13.** ('34) 57 Mad. 177 : 21 A. I. R. 1934 Mad. 52 : 35 Cr. L. J. 392 : 147 I. C. 351 (F.B.), Janardana Rao v. Lakshmi Narasamma.
**14.** ('16) 31 Mad. L. J. 440 : 4 A.I.R. 1917 Mad. 971 : 17 Cr. L. J. 515 : 36 I. C. 483 (F. B.), Emperor v. Venkanna Patrudu.
**15.** ('47) 34 A. I. R. 1947 Pat. 106 : 47 Cr. L. J. 741 : 225 I. C. 515, Surya Narain v. Surya Man Jha.
**16.** ('47) 34 A. I. R. 1947 Pat. 138 : 47 Cr. L. J. 707 : 225 I. C. 413.
**17.** ('16) 1 Pat. L. J. 232 : 3 A. I. R. 1916 Pat. 216 : 35 I. C. 468 (F. B.), Abdul Gani v. Raja Ram.
**18.** ('21) 8 A. I. R. 1921 P. C. 240. Corporation of the City of Victoria v. Bishop of Vancouver Island.
**19.** ('20) 5 Pat. L. J. 58 : 7 A. I. R. 1920 Pat. 428 : 21 Cr. L. J. 190 : 54 I. C. 894, Lalji Tiwari v. Emperor.

*U. N. Sinha*—for Petitioner.

*Government Pleader and Ram Anugrah Pd.* — for Opposite Party.

**Ramaswami J.**—The questions referred to the Full Bench are: (1) whether an application in revision against an appellate order of the District Judge under S. 476B is one governed by S. 115, Civil P. C., or whether it is governed by Ss. 435 and 439, Criminal P. C., and (2) whether the District Judge has power to award costs in such an appeal.

[2] The material facts are not in dispute. The applicant had moved the Munsif of Chapra under S. 476, Criminal P. C., alleging that the opposite party had committed forgery in a plaint filed in the Munsif's Court. The Munsif held that the evidence was doubtful and declined to make a complaint. The applicant filed an appeal which was dismissed by the District Judge of Saran who awarded costs against the applicant. The High Court is at present asked to revise this order under S. 439, Criminal P. C.

[3] In 6 Pat. L. J. 178[1] a Division Bench of this Court following the Calcutta Full Bench case, 40 Cal. 477,[2] held that the High Court cannot interfere in revision under S. 439, Criminal P. C., in such case.

[4] For the applicant learned counsel presented the argument that revision lies to the High Court under S. 439, Criminal P. C., irrespective of the fact that the order was passed by a civil, criminal or revenue Court. Learned counsel invited us to hold that the Division Bench case, 6 Pat. L. J. 178,[1] was wrongly decided. Our attention was drawn to the Bombay Full Bench case, I. L. R. (1938) Bom. 331,[3] and the Lahore Full Bench case, 13 Lah. 342.[4]

[5] On the questions referred to Full Bench there has been a great divergence of judicial opinion. But before reviewing the decisions of the various High Courts, it is necessary to examine the relevant provisions of the statute.

[6] For the applicant learned counsel relies on S. 439, Criminal P. C., which provides that

"In the case of any proceedings the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Ss. 195 (Sic), 423, 426, 427, and 428 or on Court by S. 338. . . ."

The argument is that while the High Court's power to call for record is a limited power under S. 435, limited to the proceedings of inferior criminal Court, the opening words "In the case of any proceedings" in S. 439 imply a larger power, that is, a power to revise the proceedings of subordinate Courts civil as well as criminal. But we are unable to accept this argument. In order to know the true scope of S. 439 it is necessary to consider the four preceding sections.

[7] Section 435 enables a High Court or any Sessions Judge or District Magistrate to

"call for and examine the record of any proceeding before *any inferior criminal Court* situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of such inferior Court."

It is patent that this section deals with the records of proceeding before *inferior criminal Courts* and in no way deals with the orders of a civil Court. Section 436 enables a Sessions Judge or a District Magistrate after examining the record of any case under S. 435 or otherwise, to order the commitment for trial of an accused person whom he considers to have been improperly discharged by an inferior Court. Section 437 empowers the High Court or the Sessions Judge likewise on examining any record under S. 435 "to direct further inquiry into a complaint which has been dismissed under S. 203 or sub-section (3) of S. 204 or into the case of any person accused of an offence who has been discharged. . . . ."

Section 438 empowers the Sessions Judge or the District Magistrate

"on examining under S. 435 or otherwise the record of any proceeding to report for the orders of the High Court the result of such examination. . . ."

Section 439 then provides that in the case of any proceeding the record of which has been called for, the High Court may exercise any of the powers already stated. In this section the open-

ing phrase "In the case of any proceeding" must be understood in the context with reference to the subject-matter, namely, the records and orders of the inferior criminal Courts referred to in the earlier section. The phrase " any proceeding ", is doubtless a qualified phrase and it must be construed in a manner which is consistent with the scope and object of the statute. It must be construed not in too wide a sense but in the context which points to a proceeding of a definite character, namely, a proceeding before any inferior criminal Court. So construed, S. 439 does not empower the High Court to exercise criminal revisional jurisdiction in respect of an order of a civil or revenue Court passed under S. 476.

[8] In support of this construction, I would refer to well-known rule applicable to all statutes namely, the rule of construction *ex visceribus actus* that is, within the four corners of the Act. " The office of a good expositor of an Act of Parliament " said Coke in (1595) 3 Co. Ref. 59[5] is to make construction of all the parts together and not of one part only by itself. More recently Blackburn J. re-stated the rule in (1867) 2 Q. B. 144[6].

" It is, I apprehend, in accordance with the general rule of construction in every case, that you are not only to look at the words, but you are to look at the context, the collocation, and the object of such words relating to such a matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances."

Again in (1890) 14 A C 493[7] Lord Herschell observed:

" It is beyond dispute too that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

[9] For the applicant it was however maintained that though the appeal lay to the civil Court the proceeding was criminal in nature and so could be revised under S. 439, Cr. P.C. Learned counsel referred to the Full Bench decision in I. L. R. (1938) Bom 331[3]. In that case, Beaumont, C. J. conceded that he agreed with the view that "S. 439 must be read in connection with the section which preceded it." He however added that

" though the order was not technically made by an inferior criminal Court he was of opinion that it was an order made by an inferior Court exercising jurisdiction in a criminal matter."

This argument, with great respect, does not appear to be correct. A civil Court acting under S. 476 does not exercise any criminal jurisdiction. It has no power to take cognisance of the offence, punish the offender or inflict any sentence. It merely expresses the view whether the offender has rendered himself liable to the jurisdiction of a criminal Court.

[10] In this context it is well to compare the language of Ss. 476 with S. 478 and 479. In the two latter sections the statute specifically confers criminial jurisdiction on civil and revenue Courts, and the powers and procedure are laid down in precise and well-defined terms. Section 478 clause (1) states:

" When any such offence is committed before a civil or revenue Court. . . . .such civil or revenue Court may instead of sending the case under S. 476 to a magistrate for inquiry, itself complete the inquiry and commit or to hold to bail the accused person to take his trial before the High Court or the Court of Session as the case may be. "

Section 478, clause (2) enacts:

" For the purpose of inquiry under this section the *Civil or revenue Court* may exercise all the powers of *Magistrate* and its proceedings in such enquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, and of Chapter XXXIII in cases where that chapter applies and shall be *deemed to have been* held by a Magistrate. "

It is significant that in this case the legislature considered that the civil or revenue Court should be given the powers of a Magistrate. The section indicates that when holding the enquiry the Court still functions as a civil Court and it is necessary to give it the authority of a Magistrate for the purpose. With the exception of Ss. 478 and 479 there appears to be no other provision which confers upon any civil Court as a civil Court criminal powers of any kind. It is a well-known rule of construction that an enactment which creates or appears to create new jurisdiction must be construed strictly, ( (1877) 6 CH. D. 297[8] and (1877) 2 Q. B. D. 179[9]). A comparison of Ss. 478 and 479 also indicates that in acting under S. 476 the civil Court is not exercising any criminal jurisdiction. It is still acting as a civil Court, and consequently the High Court could revise its order under S. 115, Civil P. C.

[11] This view accords with the Calcutta decision in 40 Cal. 477.[2] In that case a Full Bench consisting of five Judges headed by Lawrence Jenkins held that in the case of an order passed by a civil or revenue Court under S. 476 Cr. P. C. the High Court could not interfere under S. 439, Cr. P. C., but could exercise the powers vested in it by S. 115, Civil P. C.

[12] A Full Bench of the Allahabad High Court has adopted the same view (26 ALL. 249[10]). In that case two Judges (Stanley, C. J. and Blair J.) were of opinion that in a proceeding under S. 476, Cr. P. C., arising out of a civil Court the High Court had no jurisdiction to revise under S. 439 of the Code. The third Judge (Banerji J.) was, however, of a different view.

But in the subsequent Full Bench case (28 ALL. 554[11]) all the three Judges expressed the unanimous opinion that the High Court had no jurisdiction to exercise its revisional powers on the criminal side in such a matter.

[13] In the Full Bench case (I. L. R. 1940 Mad. 762[12]) the Madras High Court has also held that a revisional application would lie only under S. 115, Civil P. C.

[14] Learned advocate for the applicant referred to the previous Full Bench case (57 Mad. 177[13]) in which it was decided that in appeal under S. 476B, Cr. P. C., in a civil proceeding the appellate Court had power under S. 423 (c), (d) to remand the matter to the lower Court for proper disposal. But this decision is not consistent with the previous Full Bench decision in 31 M. L. J. 440[14] wherein it was stated that the High Court's powers of interference were limited to S. 115, C. P. C. Illogical as it may appear, the Full Bench in 57 Mad, 177[13] did not question the authority in 31 M. L. J. 440[14] which decision they could not overrule and did not purport to do so. The decision in 57 Mad. 177[13] cannot hence be held to be authoritative.

[15] In 13 Lah. 342[4] the Full Bench following the Bombay case decided that the High Court could exercise the power of revision under S. 439, Cr. P. C. But the decision was greatly influenced by the previous practice of the Court. The authority of the case is also weak, for Dalip Singh J. who delivered the leading judgment conceded "if the matter were *res integra* I would have come to the conclusion that the Allahabad view was a correct one."

[16] From this review of the authorities emerges the answer to the questions referred to the Full Bench. In my opinion the answer to the first question is that an application in revision against an order of the District Judge under S. 476 (S. 476B?), Cr. P. C.. is governed not by S. 439, Cr. P. C., but by S. 115, C. P. C.

[17] If this answer is correct, the High Court can exercise revisional powers only where the subordinate Court has acted without jurisdiction or has failed to exercise its jurisdiction or has acted in the exercise of its jurisdiction illegally or with material irregularity. Learned advocate for the applicant urged that in awarding costs in the proceeding the District Judge acted illegally in exercise of his jurisdiction. This involves consideration of the question whether the District Judge has power to award costs in an appeal under S. 476B, Cr. P. C. If, as I have already held, the High Court could exercise revisional power under S. 115, C. P. C., it is a logical corollary that while acting under S. 476 the civil Court remains and acts as a civil Court. The fact that an appeal lies to an appellate civil Court also emphasises the civil character of the Court dealing with the application. Learned Government Pleader suggested that the Court could possibly award costs under S. 35, Civil P. C. But it is doubtful if S. 35 or S. 141, Civil P. C., will apply to the special proceedings provided in Ss. 476 and 476B, Cr. P. C. In A. I. R. 1947 Pat. 106[15] Shearer J. held that since the Court was a civil Court, it had jurisdiction under S. 35, C. P. C. to award costs. But in *Kheyali Singh* v. *Nanu Lal Singh*[16] Agarwala J. (as he then was) pointed out that when a civil Court took action under S. 476 it exercised powers conferred on it by the Cr. P. C. and its proceedings were governed by the provisions of that Code. I consider that the general provision of S. 35 will not apply to an appeal under S. 476B for which special provision has been made in the Cr. P. C. It is obvious that the special law, that is, S. 476B., which is self-contained and does not provide for costs, must prevail over the general provision of S. 35 of the Code. In my view the decision in A. I. R. 1947 Pat. 138[16] is correct. In the present case I hold that in awarding costs the appellate Court acted illegally in exercise of its jurisdiction.

[18] I would, therefore, allow the application to this extent that the order as regards costs in the Court of the District Judge is set aside.

[19] I do not propose to make any order for costs incurred in the High Court.

[20] **Agarwala C. J.**—I agree.

[21] **Manohar Lall J.**—I agree and wish to add a few observations. In this Court we have adopted the rule that this Court will not ordinarily depart from a long course of decisions of the Calcutta High Court: *see* 1 Pat. L. J. 232.[17] The rule laid down in 40 Cal. 477[2] has been always followed in this Court and it is not desirable to upset that practice.

[22] Upon a further examination of the question I am satisfied that the view taken in 40 Cal. 477[2] is correct. The critical question to decide is what is the nature of the proceedings which are taken by civil Courts when exercising powers under S. 476, Criminal P. C. How can the proceedings be called "criminal" when the very object of starting them is to decide whether a criminal complaint should or should not be lodged?

[23] The argument of the learned counsel for the petitioner was that S. 439, Criminal P. C., empowers the High Court to examine the proceedings of a civil Court also when it is acting under S. 476, Criminal P. C. I do not agree with this contention because S. 439 has to be read with S. 435, Criminal P. C. It is a well-known rule of construction of statutes that the Court should lean to the interpretation which would avoid in-

consistency between the different parts of the statute: *see* the judgment of Lord Atkinson in A.I.R. 1921 P. C. 240.[18] Das J. in 5 Pat. L. J. 58[19] adopted the same rule when considering the ambit of S. 195 (b) and S. 476, Criminal P. C., as it stood in 1919. I am, therefore, of the opinion that S. 439 does not empower the High Court to examine the records of a proceeding which is not the proceeding of an inferior criminal Court.

[23a] It was then argued that S. 476B (which gives a right of appeal against an order passed under S. 476A, Criminal P. C.) being inserted in the Code, it must be taken to be an order of "criminal" nature and, therefore, revisable under S. 439, Criminal P. C. I am unable to agree with this argument either, because, as I have held above, the nature of the proceedings in the first Court not being of the nature of criminal proceedings, the appellate order in such a proceeding would not convert it into a criminal proceeding. It will also be observed that S. 476B is to be found in Chap. 35 which has nothing to do with appeals. The chapter relating to appeals is Chap. 31 which opens with S. 404 which provides that "no appeal shall lie from any judgment or order of a criminal Court . . . ." Section 476B was necessary, otherwise no appeal would lie against an order passed under S. 476 or S. 476A, Criminal P. C.

[24] I agree with the conclusion arrived at by my learned brother Ramaswami J. after an exhaustive review by him of the leading authorities.

[25] I am also satisfied that the view of Agarwala J. (as he then was) that the civil Court has no jurisdiction to award costs was correct. The only section which empowers the civil Court to grant costs is S. 35, but that power is limited to suits and proceedings in the nature of suits. A proceeding to consider whether parties to a suit should or should not be put upon trial under the Penal Code is neither a suit nor incidental to a suit, although the offence may be alleged to have been committed in the course of the hearing of a suit or an execution proceeding.

V.B.B. *Application partly allowed.*

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**A. I. R. (35) 1948 Patna 229** *[C. N. 83.]*

AGARAWALA A. C. J. AND DAS J.

*Rampalsingh and others*—*Petitioners* — v. *Emperor.*

Criminal Revn. Nos. 845, 867 and 1264 of 1946, Decided on 10-2-1947, from decision of Addl. Session Judge, Bhagalpur, D/- 1-5-1946.

(a) Defence of India Act (1939)— Rules, Orders and Notifications under — Expiry of—Proceedings taken and person punished under them before expiry —Proceedings, if can be re-opened and persons "dispunished", upon expiry of statute— Interpretation of statutes— Repeal of temporary statutes— Effect on punishments already awarded— Revisional powers of Court, if can be used.

As a general rule, unless there is a special rule to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have further effect. Consequently an offence committed against a temporary Act must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which had been taken against a person will *ipso facto* terminate. But once a person has been convicted and sentenced, it is altogether immaterial whether the Act on which the order of the Court was based expires or subsequently repealed. The continuance of the punishment is by virtue of the orders of a competent Court though it was based on the Act before it was repealed. Once the person is punished and proceedings terminated before the expiry of the Act, he cannot be "dispunished" on the expiry of the temporary statute. [Para 4]

In revision the High Court exercises a discretionary power and the transactions which had already been legally completed under a temporary statute, cannot be reopened under the discretionary power of the Court.

Consequently the expiry of the Defence of India Act, and the Rules made thereunder and the orders and Notifications made under the Rules, does not in any way affect proceedings which had terminated and been completed before the expiry of the said Act, Rules, Orders and Notifications: *Englsih and Indian case law referred.* [Para 4]

(b) Defence of India (Second Amendment) Ordinance, 1946—Whether ultra vires—Government of India Act (1935), Sch. IX, S. 72.

Defence of India (Second Amendment) Ordinance, 1946 was validly promulgated and was not ultra vires the powers of the Governor-General under S. 72, Sch. IX, Government of India Act, 1935 : 45 Cr. L. J. 341; 31 A. I. R. 1944 F. C. 86 ; 46 Cr. L. J. 589, *Ref.* [Para 6]

*Cases referred:*—

1. (1841) 8 M. & W. 234 : 10 L. J. Ex. 338, Steavenson v. Oliver.
2. ('44) 23 Pat. 240 : 31 A. I. R. 1944 Pat. 217 : 46 Cr. L. J. 112 : 215 I. C. 144, Madho Singh v. Emperor.
3. (1830) 6 Bing. 576 : 8 B. J. C. P. 212, Kay v. Goodwin.
4. (1829) 9 B. & C. 750 : 7 L. J. K. B. 335, Surtees v. Ellison.
5. (1946) 1946-2 All. E. R. 529, R. v. Wicks.
6. 96 E. R. 259, Miller's Case.
7. (1820) 168 E. R. 881, R. v. Mckenzi.
8. ('33) 20 A. I. R. 1933 All. 669 : 55 All 961: 145 I C 680 : 34 Cr L J. 1030 (FB), B. Bansgopal v. Emperor.
9. ('44) 1944 F. C. R. 1 : 30 A. I. R. 1943 F. C. 75 : I.L.R.(1943) Kar. F. C. 103 : 45 Cr.L.J. 341 : 211 I.C. 241 (F. C.), Emperor v. Sibnath Banerji,
10. ('44) 31 A. I. R. 1944 F. C. 86 : 23 Pat. 678 : 1944 F. C. R. 295 : I. L. R. (1944) Kar. F. C. 172 (F. C.), Basanta Chandra v. Emperor.
11. ('45) 32 A. I. R. 1945 P. C. 48 : 46 Cr. L. J. 589 : I.L R. (1945) Kar. P. C. 97 : 72 I.A. 57: 219 I.C. 263 : 1945 F. C. R. 161 (P. C.), Emperor v. Benoari Lal Sarma.

*Dasu Sinha (in No. 845), Ramananda Sinha (in No. 867) and S. C. Mukharji (in No. 1264)* — for Petitioners.

*K. P. Varma (in Nos. 845, 867 and 1264)* —for the Crown.

**Das J.**— These three applications in revision arise out of three separate cases. They have, however, been heard together, because of a

common question of law which arises in them. I shall first deal with the common question of law and then deal with the facts of each case separately, so far as those facts are material for the contentions raised before us.

[2] The common question of law which has been raised is the effect of the expiry of the Defence of India Act and the Rules made thereunder on the convictions recorded and the sentences passed in these three cases. For the purpose of considering the question of law, it is sufficient to state that in Criminal Revision No. 845 of 1946, the two petitioners have been convicted and sentenced under Rule 81 (4) of the Defence of India Rules for the contravention of certain notifications made by the Governor of Bihar in exercise of the powers conferred by sub-rule (2) of Rule 81, Defence of India Rules. The contravention took place on 15th May 1945 and related to the despatch of some bags of rice by Shree Sita Ram Rice Mills of Nirmali of which petitioner Ram Pal Singh was the proprietor and petitioner Gulabchand Rai was the Manager. The prosecution case was that the bags of rice had been despatched from Nirmali to a place in the Muzaffarpur District in contravention of certain notifications made by the Governor of Bihar relating to the transport of rice from one district to another. In Criminal Revision No. 867 of 1946 the petitioner is one Sadho Rai. He was convicted and sentenced under R. 81 (4) read with R. 121, Defence of India Rules, for a contravention of a similar notification relating to the transport of rice from one district to another. In Criminal Revision No. 1264 of 1946 the petitioner is Haricharan Bhagat. He was convicted and sentenced under R. 81 (4), Defence of India Rules, for contravening the terms of a licence granted to him under Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1945.

[3] Now, the point of law which has been urged before us on behalf of the petitioners is that the Defence of India Act, the rules made thereunder, the orders and Notifications made under the Rules—all ceased to have any effect after 30th September 1946, and the expiry of the said Act, Rules, Orders and Notifications must now be given effect to by setting aside the convictions and sentences passed against the petitioners. Sub-s. (4) of S. 1, Defence of India Act, 1939, as it originally stood, said that "the Act shall remain in force during the continuance of the present war and for a period of six months thereafter." Ordinance X of 1946 passed by the Governor-General on 5th February 1946, determines the date of the termination of the present war for certain purposes. It says, *inter alia*, that for the purposes of any provision made after 2nd September 1939, in any enactment or in any notification, rule or order under any enactment, etc., making any reference to the present war or the present hostilities, the present war and present hostilities shall, unless the subject or context otherwise requires, be deemed to continue to, and to end on, the day on which the Proclamation of Emergency made on 3rd September 1939, under Section 102, Government of India Act, 1935, is revoked. It is stated that the Proclamation was revoked on 1st April 1946, and therefore, the period of six months during which the Defence of India Act remained in force under sub-s. (4) of S. 1 of the Act expired on 30th September 1946. So far the argument of learned counsel for the petitioners appears to be unassailable. On 30th March 1946, (that is a day before the revocation of the Proclamation of Emergency), the Governor-General made and promulgated the Defence of India (Second Amendment) Ordinance, 1946, and to sub-s. (4) of S. 1, Defence of India Act, 1939, were added the following provisions, namely:

"but its expiry under the operation of this sub-section shall not affect (a) the previous operation of, or anything duly done or suffered under this Act or any rule made thereunder or any order made under any such rule, or (b) any right, privileges, obligation or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rule, or (c) any penalty, forfeiture or punishment incurred in respect of any order made under any such rule, or (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as it this Act had not expired."

If these provisions were validly enacted, then there can be no doubt that the contention raised on behalf of the petitioners must fail. Learned counsel for the petitioners has very frankly conceded this, but has argued that the Defence of India (Second Amendment) Ordinance, 1946, is ultra vires of the Governor-General as the Ordinance-making authority. This is a point which I shall presently consider. To the contention raised on behalf of the petitioners, there is, however, a short answer, which does not depend on, nor need invoke the aid of, the provisions of Ordinance XII of 1946, namely, the Defence of India (Second Amendment) Ordinance 1946. Now I propose to explain this answer before going on the provisions of Ordinance XII of 1946.

[4] It is now well settled that there is a difference between temporary statutes and statutes which are repealed. The leading authority on this point is (1841) 8 M & W 234[1] where Parke B. expressed the distinction in the following words (at p. 241 of the report):

"There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

We are not in the present case dealing with a repealed statute and I do not, therefore, pause to consider the effect of the Interpretation Act, 1889, S. 38 (2) (c) and (d), which provides that the repeal of an Act passed after the commencement of the Interpretation Act shall not unless the contrary intention appears, affect any liability incurred or affect any penalty or punishment incurred in respect of any offence committed against any enactment so repealed, etc., nor is it necessary to consider the corresponding provisions in S. 6, General Clauses Act, 1897, which makes a similar provision with regard to Indian Law. I have already said that we are not dealing here with a repealed statute, and S. 6, General Clauses Act, 1897, refers to a Central Act or Regulation. In a decision of this Court in 23 Pat. 240[2] it has been held that the Defence of India Rules are not a Central Act or a Regulation within the meaning of S. 6, General Clauses Act, 1897, and nothing in R. 3 (1), Defence of India Rules, which applies the General Clauses Act, 1897, to the interpretation of the Defence of India Rules, can extend the scope of S. 6, General Clauses Act, 1897. It is sufficient to state that even the repeal of a statute does not invalidate transactions already completed under the repealed statute. This is made clear in the observations of Parke, B., quoted above. Maxwell on the Interpretation of Statutes has put the matter thus:

"Where an Act expired or was repealed, it was formerly regarded, in the absence of provisions to the contrary, as having never existed, except as to matters and transactions past and closed. Where, therefore, a penal law was broken, the offender could not be punished under it, if it expired before he was convicted, although the prosecution was begun while the Act was still in force."

Maxwell has quoted in support several English decisions: (1830) 6 Bing. 576;[3] (1829) 9 B. & C. 750[4] at p. 752, etc. It has been observed by Lord Goddard C. J. in a very recent decision, 1946-2 All E. R. 529[5]:

"There are dicta both by the Chief Baron and by Alderson, B. in (1841) 8 M. & W. 234[1] which go further, and appear to say that in any case where a man offends against a temporary statute he can be convicted and punished after its expiration but this is contrary to the older cases which were not cited to the Judges, in particular, 96 E. R. 259[6] and (1820) 168 E. R. 881.[7]"

The position under a temporary statute, so far as transactions already completed are concerned, cannot be worse than under a repealed statute. To hold otherwise would mean that a person who commits an offence against an Act of a temporary nature and is punished for disobeying the Act during its existence as a law is to become "dispunished" on its ceasing to exist. In (1841) 8 M. & W. 234[1] Alderson, B. expressed himself specially against any such contention. In all the three cases before us the convictions of the appellants had been recorded and the appeals by them disposed of before the expiry of the temporary statute. In Cri Rev. No. 845 of 1946 the offence was committed on 15-5-1945, and conviction was recorded on 22-3-1946. The appeal was disposed of on 1-5-1946. In Cri. Rev. No. 867 of 1946 the offence was committed on 19-1-1946, conviction was recorded on 18-4-1946, and the appeal was disposed of on 25-5-1946. In Cri. Rev. No. 1264 of 1946, the offence was committed on 2-9-1945, conviction was recorded on 16-5-1946, and the appeal was disposed of on 7-9-1946. Therefore, in all the three cases the proceedings for the prosecution had concluded before the expiry of the temporary statute. In two of the cases the applications in revision were filed when the temporary statute was in force. In the third case the application was filed after the expiry of the statute. The applications in revision have no doubt been heard after the expiry of the statute. This in my opinion makes no difference. In revision this Court exercises a discretionary power, and it can never have been intended that transactions which had already been legally completed under a temporary statute should be reopened under the discretionary powers of this Court. It is also to be noted that all necessary proceedings for the punishment of the offenders had been taken by the Crown during the time the statute was in force, and the right of appeal which the offenders had under the law, had also been unsuccessfully exercised within that time. Dealing with the question of temporary statutes in A.I.R. 1933 ALL. 669[8] Sulaiman C. J. had stated:

"According to the English Law, as a general rule, unless there is a special rule to the contrary, after a temporary act has expired no proceedings can be taken upon it and it ceases to have any further effect. It would follow that an offence committed against a temporary Act must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which had been taken against a person will *ipso facto* terminate."

In that case it was further observed as follows:

"Once a person has been convicted and sentenced it is altogether immaterial whether an Act on which the order of the Court was based expires or is subsequently repealed. The continuance of the punishment is not in consequence of the operation of S. 6, General Clauses Act, any longer, but is by virtue of the order of a competent Court though it was based on the Act before it was repealed."

In the cases before us the proceedings against the petitioners had terminated and the petitioners had been punished before the expiry of the Act.

That being the position, the petitioners cannot now be "dispunished", to borrow the expression used by Alderson, B. after the expiry of the temporary statute. This, in my opinion, is the short answer to the contention raised on behalf of the petitioners. A similar view can be inferred from the observations made by Lord Goddard C. J. in 1946-2 All. E. R. 529[5] referred to above. Dealing with the contention that a particular provision in the Emergency Powers (Defence) Act, 1939, covered only past and completed acts, the Lord Chief Justice observed :

"Now if this sub-section operates only on matters past and completed, it may well be asked what object there was in enacting it at all. A competent authority or administrator under the Act would not require it for his protection after the Act had expired, provided what had been done or omitted thereunder was authorised by the Act at the time of the act or omission. To take an example, if after the expiration an action of trespass, either to the person or to property, were brought against an officer of the Crown alleging detention without trial or taking possession of land against the will of the owner, he could plead that, at the time he did the act complained of, it was justified by the law then in force."

This shows that for past and completed acts no special provision was necessary. The special provisions made in Ordinance XII of 1946, no doubt, cover past and completed proceedings, as also proceedings instituted but not completed. We are, however, considering the matter as though there were no such special provisions. In my view the expiry of the Defence of India Act, the Rules made thereunder, the Orders and Notifications made under the Rules does not, in any way, affect proceedings, which had terminated and been completed before the expiry of the said Act, Rules, Orders and Notifications.

[5] I now come to Ordinance XII of 1946. The Ordinance was made and promulgated by the Governor-General in exercise of the powers conferred by S. 72, Government of India Act, as set out in Sch. 9, Government of India Act, 1935. Under that section the Governor-General may, in case of emergency make and promulgate ordinances "for the peace and good Government in British India or any part thereof." The section further says that the Ordinance has the like force of law as an Act passed by the Indian Legislature. The section, as it originally stood, makes the Ordinance valid for a period of six months only. By amendments made by the India and Burma (Emergency Provisions) Act, 1940, the words "for the space of not more than six months from its promulgation" were suspended during the period specified therein, which period came to an end on 1-4-1946, under the India and Burma (Termination of Emergency) Order, 1946. Learned counsel for the petitioners has contended before us that the Governor-General could not by Ordinance directly amend an Act of the Indian Legislature, and therefore, the Ordinance in question is *ultra vires* of the powers of the Governor-General under S. 72 of Sch. 9. This very contention was raised before the Federal Court in 1944 F. C. R. 1.[9] Their Lordships pointed out that the question in the broad form in which it had been put in that case was not capable of a comprehensive answer, and considered it unnecessary to pronounce any decision on that question, in the view which their Lordships took of another section of Ordinance 14 [XIV] of 1943 which was the Ordinance under consideration in that case. It was, however, pointed out by their Lordships that as regards subject-matter and local extent the powers of the Ordinance-making authority were coextensive with those of tne ordinary Legislature, but there were two limitations upon its powers : (1) as to the circumstances in which the powers could be exercised, and (2) the limitation as to the time during which any measure enacted by Ordinance-making authority would remain in operation. The first limitation related to the existence of an emergency, and it was pointed out that the Court could not go behind a declaration of emergency made by the Ordinance-making authority. The case went up to the Privy Council, and was decided on a ground which relieved their Lordships, as observed by Lord Thankerton who delivered the judgment of their Lordships, from any consideration of Ordinance 14 [XIV] of 1943. In A. I. R. 1944 F. C. 86[10] the validity of the Restriction and Detention Ordinance (3 [III] of 1944) was questioned before the Federal Court and dealing with that question it was pointed out by their Lordships that the words "for the peace and good Government in British India" were words of the widest amplitude. The argument was again raised as to the power of the Ordinance-making authority to repeal a provision of an independent legislative measure, but it was stated that the argument did not call for determination in that case. It was, however, observed that it would be too much to maintain that no Ordinance could contain any provision inconsistent with a provision contained in any Act of the Legislature. In A I.R. 1945 P. C. 48[11] the power of the Ordinance-making authority under S. 72 was considered by their Lordships of the Privy Council and it was observed as follows :

"Assuming that the condition as to emergency is fulfilled, the Governor-General acting under para. 72 may repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do."

The question in that case was whether the Governor-General could exclude the revisional and appellate powers of the High Court in cases

dealt with by the Special Courts constituted under the Ordinance, and the question had special reference to S. 223, Government of India Act, 1935. It was, however, pointed out that the Governor-General acting under para. 72 might repeal or alter the ordinary law, as to the revisionary jurisdiction of the High Court, just as the Indian Legislature might do. In the case of the Defence of India Act, 1939, the Indian Legislature could certainly amend it. I do not see why the Governor-General cannot do the same in exercise of the powers given to him under S. 72, provided the restrictions mentioned therein are not exceeded. It has not been shown to us that in making and promulgating Ordinance 12 [XII] of 1946 the Governor-General has exceeded or ignored the restrictions imposed upon him by S. 72. As to the emergency there is a clear recital in the preamble, and as pointed out by their Lordships of the Privy Council in A. I. R. 1945 P. C. 48,[11] the question whether an emergency existed at the time when the Ordinance was made and promulgated was a matter of which the Governor-General was the sole Judge. The other restriction as to time also does not appear to have been exceeded, because the Governor-General has merely incorporated certain provisions regarding the effect of the expiry of the temporary statute. It was not an attempt to amend a permanent enactment of the Legislature, as distinguished from an attempt to amend an act of limited duration, a distinction which was pointed out by their Lordships of Federal Court in 1944 F. C. R. 1.[9] I must confess that there may be some difficulty regarding that part of the provisions of the Ordinance which allows legal proceedings to be "instituted" after the expiry of that : it may be argued that that is legislating for the future and for an indefinite period. That question does not, however, arise in the present case, and the Ordinance cannot be held to be *ultra vires* on that ground, that part being clearly severable from the rest of the provisions.

[6] For the reasons given above, I am unable to accept the contention that Ordinance 12 [XII] of 1946, was *ultra vires* of the powers of the Governor-General under S. 72 as set out in Sch. 9, Government of India Act, 1935. The provisions of this Ordinance place the matter beyond any doubt whatsoever. It states that the expiry of the Act shall not affect any penalty, forfeiture or punishment incurred in respect of any contravention of any rule made under any Act or of any order made under any such rule. The conviction made and punishment imposed on the petitioners cannot, therefore, be set aside on the ground that the Defence of India Act and the Rules made thereunder have expired after 30th September, 1946.

[7] It remains now to consider the facts of each case. It would be convenient to take up each application separately. In Criminal Revision No. 845 of 1945 case was that Shree Sita Ram Rice Mills, of which petitioner Rampal Singh was the proprietor and petitioner Gulabchand Rai was the Manager, had despatched rice to a place in Muzaffarpur in contravention of a permit which had been granted to the Mills for the despatch of "khudi" only from Nirmali to Bhagwanpur. The Courts below have found these facts to be clearly established by the evidence in the record, and nothing has been stated before us which should lead us to think that any error had been committed by the Courts below. There was one document, Ex. 1 regarding the admissibility of which there was some doubt. The Court of appeal below has however, considered the case leaving Ex. 1 out of consideration. The only substantial point which has been argued before us is that Gulabchand Rai, the manager, could not be made liable for the following reasons. The prosecution case was that the bags were loaded by some coolies under the supervision of an employee of the name Balak Tewari, of the Rice Mills. The defence of the petitioners was that the loading had been done by mistake. The plea of mistake has, however, been negatived by the Courts below for very good grounds. The proprietor of the Mills was undoubtedly responsible for the act of his servant done within the scope and authority of his employment. Gulabchand was not present at the time of the loading, nor was the employer. He was merely another employee of the Rice Mills. I do not, therefore, think that Gulabchand can be held liable for the act of another employee, namely Balak Tewari. The only person who can be held liable for a contravention of the permit is Rampal Singh, who is responsible in law for the acts of his servant done within the scope and authority of the latter's employment. In Criminal Revision No. 867 of 1946 the point which has been urged before us is that the petitioner had been prejudiced by the amendment of the charge at a very late stage of the trial. In my opinion, there was no prejudice. What happened was that R. 121 of the Defence of India Rules was not mentioned in the charge at first. This was subsequently added, and the petitioner was given a further chance to cross-examine prosecution witnesses and adduce any additional evidence, if he so liked. From the very beginning the prosecution case was that the petitioner had taken some bags of rice to Gerhi Ghat for the purpose of taking them by boat across the river to another district. The petitioner was sitting on 42 bags of rice when he was questioned by the Food

Grain Inspector. The petitioner admitted that he was waiting to take the bags of rice to the district of Saran on the other side of the river. It has been contended before us that the statement of the petitioner to the Food Grain Inspector was not admissible in evidence. The Food Grain Inspector was not, however, a police officer, and there is nothing to show that the statement was made as a result of any threat, inducement, etc. The Court of appeal below, however, has not decided the case on the basis of the statement made by the petitioner. It has decided the case on the other evidence in the record, and has come to the finding that the petitioner was doing an act preparatory to a contravention of certain notifications forbidding the transport of rice from one district to another In my opinion, the petition has no merit.

[8] In Criminal Revision No. 1264 of 1946, the petitioner has been found to have contravened the terms of a licence granted to him under Cl. 3 of the Bihar Cotton Cloth and Yarn (Control) Order, 1945. Learned counsel for the petitioner has made a gallant but unsuccessful effort before us to show that there was no contravention of the terms of the licence. It appears that house and the shop of the petitioner was searched on 2nd Sept. 1945, by a Magistrate, and on verification of the stock register it was found that there was a shortage of several pairs of dhotis and saris, 949 yards of other cloth, 13 chaddars and 3 towels. It has been contended before us that the Magistrate did not count or measure certain cut-pieces, nor did he take account of the transactions of the day. These points have been sufficiently dealt with by the Court of appeal below. The shortage in towels and chaddars cannot be accounted for by cut-pieces. I am. therefore, of the view that the petitioner had been rightly convicted of contravening the conditions of the licence granted to him.

[9] In the result, I would allow the application of Gulabchand Rai in Criminal Revision No. 865 of 1946. The conviction and sentence passed against him are set aside. He is discharged from bail. The applications of the other petitioners fail, and are dismissed. There are no grounds for interference with the sentences passed. Those of the petitioners other than Gulabchand Rai who have been sentenced to imprisonment must now surrender themselves to their bails and serve out the sentences imposed on them.

**Agarwala Ag. C. J.**—I agree.

R.G.D. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 234** *[C. N. 84.]*

AGARWALA AG. C. J. AND AYYAR J.

*Peshan Shaikh and others*—*Petitioners.* v. *Emperor.*

Criminal Rev. No. 597 of 1947, Decided on 10-10-1947, against order of Addl. Dist. Magistrate, Santal Parganas, D/- 15-5-1947.

**Santal Parganas Justice Amendment and Miscellaneous Provisions Regulation of 1947, S. 2 (b)—Conviction by first Class Magistrate—Pending apppel to Additional District Magistrate, Santal Parganas Justice Amendment and Miscellaneous Provisions Regulation of 1947 coming into force—Additional District Magistrate has jurisdiction to dispose of appeal—Bihar and Orissa General Clauses Act (1 of 1917), S. 8 (c).**

**A Regulation duly passed by a Governor acting under S. 92 (2) of Government of India Act, 1935 is to have the force of and is to be regarded in every way as a Provincial Act except that it is enacted by the Governor acting in his discretion. Santal Parganas Justice Amendment and Miscellaneous Provisions Regulation of 1947 was made by the Governor under S. 92 (2) of Government of India Act and hence is a "Bihar and Orissa Act" for the purposes of S. 8 (c) of Bihar General Clauses Act. The Regulation must also be regarded as a repealing enactment within meaning of S. 8 (c) of Bihar General Clauses Act. Hence where an accused is convicted by a first class Magistrate and an appeal is filed before an Additional District Magistrate he has jurisdiction to dispose of the appeal even though pending such appeal the Santal Parganas Justice Amendment and Miscellaneous Provisions Regulation of 1947 comes into force as the Regulation will not affect the appeal which was already pending.**

[Paras 5, 6 and 7]

*S. R. Ghosal*—for Petitioners.

*K. P. Varma*—for the Crown.

**Ayyar J.**— The petitioners were convicted and sentenced by the Sub-Divisional Magistrate of Pakaur in Santal Parganas under S. 4 of the Bihar Fowls etc., Cattel Movement Control Order, 1943, and two of them were further convicted and sentenced under S. 353, Penal Code by the same Court by a judgment dated 12th August 1946. There was an appeal to the Additional District Magistrate of Santal Parganas against this conviction, and by his judgment dated 15th May 1947, the learned Additional District Magistrate dismissed the appeal. While the appeal was pending before the learned Additional District Magistrate, that is, on 12th April, 1947, the Santal Parganas Justice Amendment and Miscellaneous Provisions Regulation of 1947 came into force in the Santal Parganas, and S. 2 (b) of this Regulation provided inter alia that any person convicted by a first class Magistrate could appeal to the Court of Session. On the strength of this provision it was contended, therefore, before Shearer, J., who first heard this application, that the learned Additional District Magistrate had no jurisdiction to hear the appeal and that the order passed by him on 15th May 1947, was

illegal and fit to be set aside. As a point of law is involved in this contention, affecting a number of similar applications pending before the Court, the matter has been referred to a Division Bench.

[2] To appreciate the point raised, it will be necessary to give a short history of the provisions made from time to time for the hearing of appeals from convictions in the Santal Parganas and to explain the circumstances in which this point of law has come to be raised. The Santal Parganas Justice Regulation of 1893, which is the earliest Regulation to be considered, provided for appeals from convictions by Magistrates other than the Deputy Commissioner to be filed before the Deputy Commissioner and appeals from convictions and sentences by the Deputy Commissioner to be filed before the Commissioner as the High Court. Regulation No. IV of 1933 made no changes in this position relevant to the point in issue, but Regulation III of 1940 provided in S. 4 that the Code of Criminal Procedure, 1898, shall have effect in the Santal Parganas subject to certain modifications among which the relevant provisions are to be found in clauses (a), (b) and (c) of sub-s. (1) to S. 4. Briefly stated, clauses (a) and (b) provided for appeals to the District Magistrate from convictions by 2nd and 3rd Class Magistrates as well as 1st Class Magistrate other than the Additional District Magistrate and clause (c) prescribed that from convictions by the District Magistrate or the Additional District Magistrate appeals were to lie to the Sessions Judge. Now S. 2 (b) of the Santal Parganas Justice Regulation of 1947 made a further amendment to the 1893 Regulation by substituting the following for clauses (b) and (c) of sub-s. (1) of S. 4 of the 1893 Regulation:

"Any person convicted on a trial held by the District Magistrate, the Additional District Magistrate or any other Magistrate of the 1st class or any person sentenced under S. 349 or in respect of whom an order has been made or a sentence has been passed under S. 380 by the District Magistrate, the Additional District Magistrate or any other Magistrate of the 1st class may, subject to the provisions of para. (c), appeal to the Court of Session."

Paragraph (d) sub-s. (1) of S. 4 of the Regulation of 1940 was to be re-lettered as para. (c) and referred to appeals to the High Court from convictions by Magistrates specially empowered under S 30, Criminal P. C., and does not arise for consideration in the present petition. The position created by S. 2 of the Regulation of 1947 is, therefore, that an appeal from a conviction by a 1st Class Magistrate, including a District Magistrate or an Additional District Magistrate, lies hereafter to the Sessions Judge, and with the coming into force of the Regulation of 1947 a person in the Santal Parganas convicted by a 1st Class Magistrate may appeal to the Court of Session. The contention raised before us is that by virtue of this provision the present petitioners had acquired a right of appeal to the Sessions Judge of Santal Parganas from their conviction by a First Class Magistrate and that since this Regulation had come into force when their appeal was still pending before the Additional District Magistrate of Santal Parganas, the learned Additional District Magistrate had no jurisdiction to dispose of the appeal and his order upholding the conviction is illegal.

[3] The argument arises because unlike Regulation III of 1940, which provided in S. 4 that all cases, appeals, and revisions pending on the date on which that Regulation came into force were to be disposed of as if the Regulation of 1940 had not been passed or, in another words, under the then existing procedure, the Regulation of 1947 made no such provision in respect of cases, appeals and revisions pending on the date on which the Regulation of 1947 came into force. The question, therefore, is whether in the absence of any such specific provision in the Regulation of 1947 the Additional District Magistrate of the Santal Parganas had jurisdiction to dispose of the appeal filed by the petitioners, which was pending before him when the Regulation of 1947 came into force in the Santal Parganas.

[4] In the absence of a specific provision in this regard, S. 2 of the Regulation of 1947 must be interpreted with reference to the General Clauses Act. Section 8 (c) of the Bihar and Orissa General Clauses Act of 1917 provides that

"Where any Bihar and Orissa Act repeals any enactment hitherto made, or hereafter, to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed."

and under sub-s, (e) such repeal shall not

"affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid."

and any such investigation, legal proceeding or remedy

"may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

The question which now arises is two-fold; firstly whether the Regulation in question can be considered "a Bihar and Orissa Act" for the purposes of the General Clauses Act, and secondly whether the provision in S. 2 of the Regulation of 1947 can be regarded as a repealing enactment.

[5] Section 4 (7), General Clauses Act of 1917 defines a "Bihar and Orissa Act" as

"an Act made by the Lieutenant Governor of Bihar

and Orissa in Council under the Indian Councils Acts, 1861 to 1909, or the Government of India Act, 1915" and includes "a Bengal Act made after the 18th day of January, 1899 which is still in force in Bihar and Orissa" etc. It is true that we are here dealing with a Regulation and not with an Act. The Government of India Act of 1935 does not define a "Regulation" though S. 92 (2) provides for the making of Regulations by the Governor of a province for the peace and good government of an excluded or a partially excluded area in the province. Section 4 (45), Bihar and Orissa General Clauses Act of 1917 says that a Regulation "shall mean a regulation made under the Government of India Act, 1870, or the Government of India Act, 1915". It is to be observed, in the first place, that in the general rules of construction laid down in Ss. 6 to 22 and the further provisions embodied in Ss. 23 to 28 with regard to orders, rules etc. made under enactments, the Bihar and Orissa General Clauses Act speaks only of "a Bihar and Orissa Act" and omits all mention of "Regulations". This is in striking contrast to the corresponding provisions in the Central Act (General Clauses Act) which specially mention a "Regulation" apart from an Act. There can be no doubt, however, in my opinion, from the wording of S. 92, Government of India Act, 1935, that a Regulation duly passed by a Governor acting under the provisions of this section is to have the force of and is to be regarded in every way as a Provincial Act except that it is enacted by the Governor acting in his discretion. Section 92 (1) lays down that the executive authority of a province extends to the excluded and partially excluded areas therein but that no Act of the Federal Legislature or of the Provincial Legislature shall apply to such areas unless the Governor by a public notification so directs. and this sub-section also empowers the Governor to make such exceptions or modifications as he thinks fit in the application of such an Act to an excluded or a partially excluded area. In sub-S.(2) of S. 92 the Governor has been given the power to

"make Regulations for the peace and good government of any area in a province which is for the time being an exoluded area or a partially excluded area and any regulation so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature or any existing Indian law which is for the time being applicable to the area in question",

and goes on to say that such Regulations "shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect", and contains the usual further safeguard vesting a power in His Majesty to disallow such Regulations assented to by the Governor-General in the same way as any Act of a Provincial Legislature assented to by him. The Santal Parganas Justice Regulation of 1947 was admittedly made by the Governor under sub-s. (2) of S. 92 of the Government of India Act, 1935, and received the assent of the Governor-General on 26th February 1947. Under S. 92 (2) of the Government of India Act, a Regulation made by the Governor may have the effect of repealing or amending any Act of the Federal or the Provincial Legislature or any existing Indian Law which is for the time being applicable to the excluded area in question; it would obviously be incongruous to hold therefore, that a Regulation duly made by the Governor of Bihar is something less than "a Bihar and Orissa Act" for the purposes of the General Clauses Act of 1917. If this position is accepted, as I think it must be, the petitioners had a right to contend under S. 8 (c) of the Bihar and Orissa General Clauses Act that their former right of appeal to the Deputy Commissioner from a conviction by a first class Magistrate had accrued under the old Regulation and could be exercised to its completion in spite of the fact that the Regulation of 1947 had come into force when their appeal before the Deputy Commissioner was still pending; conversely, under S. 8 (e) of the Bihar and Orissa General Clauses Act, the Regulation of 1947 did not affect the appeal which was already pending.

[6] The Santal Parganas Justice Regulation of 1947 merely purported to amend the Santal Parganas Justice Regulation of 1893 in regard to appeals from first class Magistrates. In effect, however, the provision that appeals from convictions by first class Magistrates, other than the District or Additional District Magistrates, would lie to the Court of Session repealed the former provision that such appeals lay to the District Magistrate. In other words, the amendment Regulation of 1947 must be regarded as a repealing enactment so far as the point in controversy is concerned.

[7] In the result, therefore, it must be held that the Additional District Magistrate of Santal Parganas had the necessary jurisdiction to hear the appeal filed before him by the petitioners and that he was competent to dispose of this appeal in the way he did by his judgment dated 15th May 1947. No other point has been raised on behalf of the petitioners or in the reference made by Shearer J., and the application must be rejected.

**Agarwala Ag. C. J.**—I agree.

D.S. *Application rejected.*

**A. I. R. (35) 1948 Patna 237** *[C. N. 85.]*

AGARWALA AG. C. J. AND MEREDITH J.

*Governor-General in council—Defendant—Appellant* v. *Messrs. Ranglal Nandlal—Plaintiff—Respondent.*

A. F. A. D. Nos. 1234 and 1235 of 1946, Decided on 8-1-1948, from decision of 3rd Addl. Sub-Judge, Gaya, D/- 25-4-1946.

**Evidence Act (1872), S. 114, illus (g)—Non production of material evidence by defendant—Adverse inference can be drawn even if plaintiff did not call upon defendant to produce such evidence.**

**Where the defendant has not examined an important witness and has not produced relevant documents, the mere fact that the plaintiff did not call upon the defendant to produce this evidence is no reason why the Court should not draw an adverse inference against the defendant on the ground of the non-production of the evidence : 24 A. I. R. 1937 P. C. 152, *Ref.*** [Para 2]

**Annotation : ('46-Man), Evd. Act, S. 114, N. 11.**

*Case referred* :-

1. ('37) 64 I. A. 176 : 24 A. I. R. 1937 P. C. 152 : I. L. R. (1937) Bom. 375 : 31 S. L. R, 326 : 168 I. C. 1 (P. C.), Surat Cotton Spinning and Weaving Mills Ltd. v. Secretary of State.

*S. N. Bose and N. C. Ghosh*—for Appellant.

*Raj Kishore Prasad*—for Respondent.

**Agarwala Ag. C. J.**—These two appeals by the defendant are from a decision of the Subordinate Judge reversing a decision of the Munsif in two suits which were tried together. On 9th January 1943, the plaintiff handed over to the East India Railway Co., two consignments of cloth at Cawnpore for despatch to Gaya. One consignment consisted of three bales and the other of two bales. Both consignments were covered by a Risk Note in Form Z which, in so far as its terms are relevant for these appeals, exonerates the Railway Company from liability for the loss of a part of a consignment, except in cases where the loss is due to the misconduct of the Company or its servants. Out of one of the consignments one bale was not delivered to the consignee and neither of the bales of the other consignment was delivered to him, with the result that he instituted two suits out of which these appeals have arisen. The Court of appeal below has found that the theft took place at Karamnasa, a station between Mogulsarai and Gaya, and that the theft was with the connivance of the railway servants at Karamnasa or due to their misconduct. The facts are that the train arrived from Cawnpore at Mogulsarai with the seals of its wagons intact. The seals on the doors of the wagons were checked at Mogulsarai before the train left there. At Karamnasa the train was shunted on to a dark siding. It was the duty of the Guard to check the seals of all the wagons in the train at Karamnasa. He did not do so. Some twenty minutes after the train had been put on the siding it was reported to the Guard that the door of one of the wagons was open. The Guard then went to this wagon and verified the fact that the door was open and reported the matter to the Assistant Station Master who had the door resealed. When the wagon reached its destination, namely, Gaya, it was found that the loss I have mentioned above had occurred.

[2] The findings of the Court of appeal below are challenged on the ground that the Court has drawn an inference adverse to the defendant from the omission to examine the Watch and Ward men who were on duty at Karamnasa, or to produce the reports which they made relative to the train of which the wagon carrying the missing consignments was a part. It is contended that this inference should not have been drawn against the defendant in this case in view of the fact that, after the defendant had produced his evidence, he offered to examine such further evidence as the plaintiff should desire, and the plaintiff did not then call upon him to examine the Watch and Ward men or to produce their reports. In support of this proposition reference was made to the decision of the Privy Council in 64 I. A. 176.[1] That case, however, so far from supporting the proposition for which it is cited, is a complete authority for the contrary. The facts in that case were that the doors of a wagon containing bales of cloth were opened while the train was at the station at Buxar, and a number of bales were removed after the train had left Buxar. The Guard, whose duty it was to examine the seals on the doors of the wagon, was not among the witnesses whom the defendant at first examined. At the close of the defendant's evidence, however, an application was made to examine this Guard on commission. The application was rejected. At a subsequent stage of the litigation the defendant offered to examine the Guard in Court, but did not eventually do so. The Privy Council held that an inference adverse to the defendant could be drawn by reason of the non-examination of the Guards, although it will be noticed that at no time had the plaintiff called upon the defendant to produce this witness. In fact the Privy Council pointed out that it was clearly for the defendant himself to decide whether he had produced all the evidence which he desired to adduce in order to avoid an inference of misconduct. Here too, the defendant, in order to avoid an inference adverse to him for non-examination of the Watch and Ward staff at Karamnasa and for the non-production of the reports, should have examined the men who were on duty. The mere fact that the plaintiff did not call upon the defendant to produce this evidence was no reason why the Court below should not have drawn an adverse inference

against the defendant on the ground of the non-production of this evidence.

[3] Furthermore, there was ample evidence from which the Court could infer that the theft did not take place while the train was in motion from Mogulsarai to Karamnasa, but at Karamnasa itself, and that the removal of the goods from the wagon was with the connivance of, or due to the misconduct of the railway staff at Karamnasa. With regard to the first of these points, the evidence discloses that the seals of the wagon containing the bales were checked at Mogulsarai and found intact. The bales were of sufficient weight to require a number of men for their removal. The Guard in charge of the train did not notice the presence of such a number of men anywhere on the track between Mogulsarai and Karmnasa. There is no evidence that the door of the wagon was found open on its arrival at Karmnasa. The fact that the door was open was not disclosed to the guard until twenty minutes after the train had been put on the siding. The only person or persons who could have stated whether the door was open on the arrival of the train were the men who made the report to the guard and who have not been examined. This evidence and these circumstances afford an ample basis for the Court below to have come to the conclusion that the theft took place at Karamnasa. With regard to the Court's finding that the removal of the goods was with the connivance or owing to the misconduct of the railway staff at Karamnasa, the evidence and the circumstances are also sufficient for this purpose. From the evidence of the guard, it would appear that there were two Watch and Ward men on duty at Karamnasa. Unless these persons took part in the removal of the goods or connived at their being removed, it is incredible that three heavy bales of cloth should have been removed from the wagon without anybody noticing it. I am, therefore, satisfied that there is no reason to interfere with the view taken by the Court below that the loss of these goods was due to the misconduct or connivance of the railway staff. The appeals must, therefore, be dismissed with costs. There will be only one hearing fee for both the appeals.

**Meredith J.**— I agree.

S.C. *Appeals dismissed.*

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**A. I. R. (35) 1948 Patna 238** *[C. N. 86.]*

SINHA J.

*Babu Lal Sahu and others—Petitioners* v. *Hakim Tamizuddin and others—Opposite party.*

Civil Revn. No. 132 of 1947, Decided on 22-9-1947, against order of Munsif, 1st Court, Begusarai, D/-17-2-1947.

**Civil P. C. (1908), O. 9, R. 5—"For a period of three months"—Court giving plaintiff only three days' time for steps to be taken for service on defendant and not indicating that defendant's name would be expunged from record for failure to take steps within time—Court's order expunging defendant and not granting further time held contravened R. 5.**

**On 19th July 1946, the Court held that the summons on one of the defendants was served but was not proper. The plaintiff was directed to take fresh steps for service. On 7th August 1946 the Court allowed plaintiff's application of 5th August 1946 for substituted service but gave him only three days' time to take necessary steps. This order did not indicate that unless steps were taken within the time the name of the defendant would be expunged from record. On 6th September 1946 the plaintiff applied for time to take necessary setps for the substitued service. The Court ordered the defendant to be expunged for want of requisite steps.**

*Held* **that the Court acted against the provisions of O. 9, R. 5. [Para 2]**

**Annotation:—(44-Com) C. P. C., O. 9 R. 5 Notes 2 and 3.**

*K. N. Varma*—for Petitioners.

*S. Hasan and S. N. Banerji*—for Opposite Party.

**Order.**—This application in revision is directed against the orders of the learned Munsif of Begusarai expunging the defendant 10 from the suit and refusing to recall that order when the plaintiffs appeared to show cause against the order expunging that defendant. It appears, with reference to the order-sheet of the suit, that on 19th June, 1946, both parties applied for time, and one Bhutoo Mian, *karpardaz* of defendant 10, filed certain documents, as per list; but the Court ordered, notwithstanding that, that the summons had not been properly served on that defendant. The plaintiffs were directed to file processes for fresh service on the said defendant 10. On 19th July 1946, the order-sheet says that the summons to newly added defendant, that is to say, defendent 10, was served, but it was not proper. Therefore, the plaintiffs were directed to take fresh steps for service on that defendant. On the 3rd of August, the plaintiffs applied for time to take necessary steps, and, on the 5th, the plaintiffs made an application supported by an affidavit that substituted service be effected against the said defendant. The Court passed orders after hearing the parties on 7th August 1946, allowing the plaintiffs' application for substituted service, but gave them only three days' time, that is, till 10th August 1946, to take the necessary steps. This order did not indicate that unless steps were taken by that date, the name of defendant 10 would be expunged from the record. On 6th September 1946, the plaintiffs applied for time to take the necessary steps for substituted service against that defendant. The Court ordered that defendant 10 be expunged (as ?) requisite steps had not been taken.

[2] In my opinion, the Court below has acted against the provisions of Rule 5 of Order 9, Civil P. C. In the first place, the Court gave the plaintiffs only three days' time to take the necessary steps for substituted service. That in itself was wholly insufficient. The Court did not indicate in its order-sheet that it was what is here called a peremptory order. In my opinion the Court below would have exercised a sound judicial discretion if it had allowed the plaintiffs' prayer for time to take the necessary steps in the matter. Not having done so, the plaintiffs again applied to the Court for recalling that order on 20th November 1946. This delay must partly be referrable to the intervening Puja holidays. I am informed that the requisite steps for service on defendant 10 have already been taken. In those circumstances, I would set aside the orders of the learned Munsif expunging the name of defendant 10 from the record, and direct that the plaintiffs should be given an opportunity of having defendant 10 before the Court after due service of the summonses. There will be no order as to costs in this Court.

D. H. *Revision allowed.*

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**A. I. R. (35) 1948 Patna 239** *[C. N. 87.]*

IMAM AND DAS JJ.

*Raja Surajpal Singh—Appellant* v. *Ramgati Singh and others, Plaintiffs and others Defendants — Respondents.*

A. F. A. D. No. 124 of 1945, Decided on 1-4-1947, from decision of Sub-Judge, Arrah, D/- 10-11-1944.

**(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 22 (2) — Scope — Occupancy holding purchased by one cosharer landlord and sub-let to third person — Purchasing cosharer is still liable to pay rent to other cosharers — Suit for such rent — Person to whom land is sub-let is not necessary party.**

Section 22 (2) clearly recognises that when an occupancy right in land is transferred to a person jointly interested in the land as proprietor, i. e., a cosharer landlord, he shall be entitled to hold the land subject to the payment to his co-proprietors their share of the rent which may be from time to time payable to them. The fact that he sub-lets the land to some one else cannot deprive his cosharers of the right to realise from him their share of the rent which may be from time to time payable. Where the co-proprietors bring a suit for rent against the purchasing co-proprietor in respect of the holding purchased by him, the person to whom the land is sub-let is not a necessary party to such a suit: 13 A. I. R. 1926 Pat. 580, *Rel. on.* [Para 3]

**(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 112A —Proceedings under—All landlords not made parties — Notices not issued to them — Decision given in their absence — Order reducing rent held was without jurisdiction.** [Para 4]

*Cases referred* :—

1. ('27) 6 Pat. 134 : 13 A.I.R. 1926 Pat. 580 : 97 I. C. 68, Kirtya Nand v. Ram Lal.
2. ('40) 27 A. I. R. 1940 Pat. 467 : 19 Pat. 893 : 188 I. C. 50 (F. B.), Sunder Mall v. Lachhmi Tewari.
3. ('26) 7 P. L. T. 170 : 13 A. I. R. 1926 Pat. 268 : 5 Pat. 281 : 93 I. C. 1001, Jhapsi Sao v. Bibi Aliman.
4. ('22) 3 P. L. T. 13 : 9 A. I. R. 1922 Pat. 193 : 65 I. C. 586, Nand Kishore Singh v. Mathura Sahu.
5. ('22) 3 P. L. T. 22 : 9 A. I. R. 1922 Pat. 62 : 65 I. C. 281, Basudeo Narain v. Radha Kishun.
6. ('43) 24 P. L T. 175 : 30 A. I. R. 1943 Pat. 194 : 22 Pat. 382 : 207 I. C 353 (F. B.), Bibi Kaniz Fatima v. Hassain-uddin Ahmad.
7. ('37) 18 P. L. T. 700 : 24 A. I. R. 1937 Pat. 506 : 16 Pat. 500 : 171 I. C. 306, G. B. Solano v. Umeshwari Kuer.
8. ('39) 26 A. I. R. 1939 Pat. 522 : 185 I. C. 557, Sukhdeo Pandey v. Rameshwar Prasad.

*Kanhaiyaji* — for Appellant.

*L. K. Chaudhuri* — for Respondents.

**Imam J.**— This is an appeal by defendant 1 against the decision of the Subordinate Judge of Arrah who affirmed the decision of the Munsif of Buxar. The plaintiff had sued for recovery of arrears of rent for the years 1347-1350 in respect of 7.09 acres of land. The plaintiff alleged to be the malik of four annas share in the takhta in suit by virtue of a rehan deed executed in his favour by defendants 2 to 6. Defendant 1 is also a cosharer malik of that takhta. He had purchased the rent claimed land from the original raiyat at a rent sale. According to the defendant, he had settled the land after his purchase with Nathun Mahton who, he alleged, is a necessary party to the suit. His further defence was that the rent had been reduced by the Rent Reduction Officer and he was liable to pay rent at that rate to the plaintiff for his proportionate share and not at the original rate. Both the Courts below, as I have already indicated, rejected his defence and decreed the suit at the rate of rent claimed in the plaint.

[2] Mr. Kanhaiyaji on behalf of the appellant (defendant 1) has raised three points. The first point was to the effect that Nathun Mahto was a necessary party to the suit, having regard to the provisions of S. 22 (2), Bihar Tenancy Act. The second point urged by him was that the rent was properly reduced by the Rent Reduction Officer and, and therefore, the plaintiff could not get a decree at the original rate of rent. His third point was that the plaintiff mentioned in the plaint that the annual rental for the holding was Rs. 41-15-3, but had been given a decree for his share at the rate of Rs. 7-9-3.

[3] As to the first point, as far as I have been able to understand the submission of Mr. Kanhaiyaji, it is that when a cosharer purchases an occupancy right in land of a tenant in whom all the cosharers are interested, he holds the land subject to the payment to his co-proprietors or the share of the rent which may be from time to time payable to them. If he inducts on to the

land a third person such third person may either be a tenure-holder or a raiyat of the land. Defendant 1 having settled the land with Nathun Mahton, Nathun Mahton became the raiyat of the land and it was necessary to make him a party to the suit. In my opinion, Nathun Mahton might have been a proper party, but certainly was not a necessary party. As between defendant 1 and his cosharers, the only matter for decision was as to the liability of the defendant towards his cosharers for the rent of the land purchased by him from the original tenant. Section 22 (2) clearly recognises that when an occupancy right in land is transferred to a person jointly interested in the land as proprietor, he shall be entitled to hold the land subject to the payment to his co-proprietors this share of the rent which may be from time to time payable to them. The fact that he sublets the land to some one else cannot deprive his co-sharers of the right to realise from him their share of the rent which may be from time to time payable. In 6 Pat. 134[1] Ross J. observed with reference to S. 22 (2), Bihar Tenancy Act, as follows:

"The question is not free from difficulty; but it is important to observe the exact language of S. 22 (2). It is not enacted that if the transferee sublets the land to a third person, such person shall be a tenure holder or a raiyat, as the case may be, in respect of the land, but that sush person shall be deemed to be a tenure holder or a raiyat; that is to say, the section itself recognises the relationship as artificial and, by implication suggests that, by making such a settlement, the transferee is not a landlord. but that the peculiar status conferred upon him by the section still continues notwithstanding the settlement."

I myself can see no sufficient reason to doubt what was said by Ross J. in the case just cited. My own impression of the section is that no matter what the purchasing co-sharer does by way of subletting the land to a third person vis-a-vis himself and his co-sharers his liability to pay the shares of the rent to his co-sharers remains unaffected. Having regard to the view which I hold, it is clear that Nathun Mahton was not a necessary party and his absence from the position of a party in the litigation does not go to the root of the question.

[4] As to the second point, it is clear that in the rent reduction proceedings under S. 112-A, Bihar Tenancy Act, only defendant 1 was made a party and the other landlords of the holding were not made parties. No notices were issued to them. The decision was given in their absence. It is quite clear that in these circumstances the order reducing the rent was without jurisdiction. Rule 84 framed under the Bihar Tenancy Act states:

"When a landlord or tenant applies for the settlement of a fair rent, a notice in Form 18 in Schedule 1, shall be served on every person interested to the application, together with a copy of the application, or extract therefrom or summary thereof, so far as the application concerns such person."

Rule 114 states:

"Rules 82, 83, 84, 85, 87 and 88 A of these Rules shall apply as far as may be to applications under S. 112-A."

Rule 115 provides for a general notice when the Governor has issued a notification under sub-s. (1) of S. 112 A. Rule 117 states:

"If the landlord or a tenant of any occupancy holding referred to in the notice served under R. 115 does not attend after service of the said notice has been proved, the proceeding may be ex parte. Provided that when the Collector proposes to alter the existing rent of any occupancy holding and the parties have not attended in compliance with the notice served under R. 115. the Collector shall serve on such person interested a special notice, and the rent of such holding shall not be altered in the absence of such person until after the service of such special notice has been proved."

It is clear, therefore, that in the absence of other landlords on whom no special notice was served under R. 117, the rent of holding ought not to have been altered. I am satisfied, therefore, that having regard to what has been proved in this case, the order reducing the rent was without jurisdiction and does not bind the plaintiff.

[5] As to the third point, whatever may have been the error in the statement made in the plaint regarding the annual rental for the holding in question, the plaintiff claimed Rs. 7-9-3 as his annual quota of rent. Not only he gave evidence to that effect, but his evidence found support from the deposition of defendants' witness D. W. 1 who is the karinda. This witness stated specifically that the plaintiff and Babu Surajnath Singh are the maliks who receive half and half out of Rs. 15-2-6. Both the Courts below acted on this evidence and found that the rent claimed was correct. This point, in my opinion, has got no substance.

[6] In the result, I would dismiss this appeal with costs.

[7] **Das J.**—I agree, and should like to add a few observations with regard to the point which arises out of S. 22 (2), Bihar Tenancy Act. The question raised before us is if Nathun Mahton was a necessary party. The two judgments of the Courts below do not show in what circumstances the appellant, who was the purchasing co-sharer, had settled the land with Nathun Mahton and on what rent. There is nothing in the record to show that Nathun Mahton was accepted as a raiyat by the entire body of landlords; on the contrary, the judgment of the Court of appeal below shows that Nathun when he applied for reduction of rent under S. 112A, Bihar Tenancy Act, described the appellant alone as his sole landlord. It has not been proved on behalf of

the appellant that the settlement with Nathun Mahto was a *bona fide* settlement by a co-sharer landlord. It has, however, been contended on behalf of the appellant that Nathun Mahto became a raiyat in respect of the land settled with him by the purchasing co-sharer, by virtue of the provisions of S. 22(2), Bihar Tenancy Act. The appellant relies on that portion of sub-s. (2) of S. 22 which says that

"If such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat as the case may be, in respect of the land."

It is contended that the Illustration appended to the sub-seciton shows that the person who takes the land for the purpose of cultivating it himself from the transferee co-sharer becomes a raiyat in respect of the land. The point is not free from difficulty, but having heard learned counsel I have come to the conclusion that Nathun Mahto was not a necessary party in this case, and the plaintiffs-respondents could still sue the transferee co-sharer for their share of the rent which was payable to them from time to time. I have already pointed out that their is nothing in the record which would go to prove that Nathun Mahto was accepted as a raiyat by all the landlords or that the settlement made with him by the transferee co-sharer was a *bona fide* settlement. The question posed before us is if the peculiar status which the transferee co-sharer gets under S. 22(2), Bihar Tenancy Act, ceases after the transferee co-sharer settles the land with a third party. No case has been cited before us which is directly in point. The Court of appeal below relied on 6 Pat. 134[1] where the question arose in a somewhat different way. In that case, there were two bodies of landlords, one the Banaili Raj and the other Shrinagar Raj. The Banaili Raj acquired the status under S. 22(2), Bihar Tenancy Act, in respect of about 155 bighas of land. The Banaili Raj settled the lands with certain other parties. Thereafter, there was a partition between the Banaili Raj and the Srinagar Raj, and a part of 155 bighas was allotted to the Banaili Raj and a part to the Srinagar Raj. The Srinagar Raj sued one of the original tenants and obtained a decree and took proceedings for sale of the holding. Then, the Banaili Raj brought a suit for a declaration that the party whom the Srinagar Raj had sued had no connection with the land, and that the Srinagar Raj was entitled only to the proportionate rent of the 81 bighas of land. One of the points which was taken against the claim of the Banaili Raj was that after the settlement made by the Banaili Raj, the latter had no further interest in the land and the peculiar status which it had got under S. 22(2), Bihar Tenancy Act, had ceased after the settlement of the lands with third parties. This plea was not accepted, and it was observed that by making such a settlement, the transferee does not become a landlord, and the peculiar status conferred upon the transferee by S. 22 (2) still continues notwithstanding the settlement. This observation is against the contention raised on behalf of the appellant in the present appeal. The decision in 6 Pat. 134,[1] so far as it related to the position of a transferee co-sharer on partition (at least after the amendments made in S. 22 in 1907), must be considered to have been impliedly overruled by the Full Bench decision in A. I. R. 1940 Pat. 467.[2] The decision in 6 Pat. 134[1] was based on 7 P.L.T. 170,[3] 3 P. L. T. 13[4] and 3 P. L. T. 22.[5] The Full Bench referred to those earlier decisions and did not follow 7 P. L. T. 170.[3] The observation made in 6 Pat. 134[1] regarding the position of a transferee co-sharer after settlement with a third party was not, however, questioned. The matter can also be looked at from another point of view. A single co-sharer is not the landlord of the entire land and cannot create a valid tenancy in respect of it; see the observations made in 24 P. L. T. 175.[6] There are many decisions of this Court where it has been held that where a co-sharer landlord after purchasing an occupancy holding inducts a tenant on the land and realizes a higher rent than that which used to be paid by the occupancy tenant from whom the purchase was made, the other co-sharer landlords are not entitled to a share of the higher rent. It was observed that on a proper construction of S. 22 (2) of the Act, the rent referred to is the rent of the original occupancy holding, and not the rent payable in respect of the tenancy that may have been created afterwards by the purchasing co-sharer : 18 P. L. T. 700.[7] Similarly, if the purchasing co-sharer settles the land with third party on a nominal rent, the other co-sharers cannot be affected thereby and cannot be asked to forego their share of the original rent payable for the holding. As has been pointed out in A. I. R. 1940 Pat. 467,[2] the amount paid to the other co-sharers by the purchasing co-sharer is not "rent" in the strict sense of the word, but is compensation. If by operation of S. 22 (2), Bihar Tenancy Act, the third party inducted on the land becomes a raiyat under the entire body of landlords, then a very anomalous result may follow. If the third party is inducted on higher rent, then he would be paying at different rates of rent to different landlords. I do not think such a result is contemplated by S. 22 (2), Bihar Tenancy Act. There are certain observations in A. I. R. 1939 Pat. 522[8] which also show that the person inducted on the land by the purchasing co-sharer may

become a raiyat under the person so inducting him, but the action of a single co-sharer cannot prejudicially affect the right of the other co-proprietors to realize their share of the original rent from the purchasing co-sharer. The position will be different if it can be proved that the other co-sharers have accepted as tenant the person inducted by the purchasing co-sharer. The position may even be different if the settlement is a *bona fide* settlement, though I express no final opinion in that matter. In the case before us we know nothing about the circumstances in which Nathun Mahto was inducted on the land; nor the terms on which he was so inducted, I do not see how the purchasing co-sharer can say in this case that his co-proprietors must sue Nathun Mahto on a reduced rental and thereby force them to give up the right to realise their share of the original rent from the purchasing co-sharer. In my opinion, the co-proprietors in this case are still entitled to get their share of the original rent from the purchasing co-sharer, notwithstanding the settlement, if any, with Nathun Mahto, and in this view of the matter, Nathun Mahto was not a necessary party, and the plaintiff-respondents could not be non-suited on that ground.

S.C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 242** *[C. N. 88.]*

MANOHAR LALL AND MUKHARJI JJ.

*Hari Prasad Agarwala* — *Appellant* v. *Governor-General-in-Council* — *Respondent.*

A. F. A. D. No. 696 of 1946, Decided on 23-12-1947, from decision of Dist. Judge, Purulia, D/- 26-1-1946.

**Railways Act (1890), Appendix C, Cl. (3)—Signature of consignee in delivery book at destination is not conclusive evidence of complete delivery.**

According to clause (3), Appendix C of the Railways Act, the railway receipt given by the Railway Administration for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Administration, and the signature of the consignee or his agent in delivery book at destination shall be evidence of complete delivery. This however does not mean that such signature of the consignee or his agent will be conclusive evidence of complete delivery and no other evidence will be permitted to be adduced to show that really there was no complete delivery.

[Paras 3 and 6]

*S. C. Mazumdar* — for Appellant.

*S. N. Bose* — for Respondent.

**Mukharji J.**— In this second appeal the plaintiff is the appellant. The judgment under appeal is one of reversal. So far as the facts are concerned, they are practically all admitted. Plaintiff Hari Prasad Agarwala is a man of business at Jharia. On 8th August 1942 two consignments, one containing 200 bags of masur and the other 250 bags of gram, were despatched from Sasaram to Jharia under invoice NOS. 19 and 18 respectively, the consignee in each case being the plaintiff. On 17th August 1942 the plaintiff's representative went to Jharia Railway Station, paid the requisite railway freight in respect of the two consignments but for want of time could take delivery of only 30 bags of masur and 3 bags of gram. The goodshed in which the bags of masur and gram were kept was closed at 5 P.M. and so the representative of the plaintiff had to come away without taking complete delivery. When on the next day the plaintiff's man went to the Railway station again for taking delivery of the remaining bags it was found that 84 bags of masur and 51 bags of gram were missing. The plaintiff's representative thereupon took open delivery of the consignments in the presence of the goods clerk. The plaintiff claimed Rs. 1575 for the loss of masur and Rs. 733/2/- for the loss of gram. In paragraph 5 of the plaint it was stated that the loss was due to the "wilful negligence, misconduct and lack of proper care" on the part of the servants of the East Indian Railway Administration, Jharia, being a station on the East Indian Railway. The Governor-General-in-Council representing the East Indian Railway Administration, the defendants in suit, filed written statement denying liability. It was alleged in paragraph 2 of the written statement that the consignments in question reached their destination on 16th and 17th August 1942 with their seals intact. Further it was stated that they were unloaded in "good and sound condition" at Jharia Railway Station. In paragraph 3 the defendant stated that the plaintiff's representative took delivery of all the bags of both the consignments on clear receipts on 17th August 1942, but could not take away all the bags and had to leave behind some in the railway goods-shed. It was further the case of the defendant that on the evening of 17th August 1942 Jharia Railway Station was raided by an unruly and violent mob which burnt the goods-shed and the post office at Jharia and looted away property from the goods-shed including several bags of the two consignments in suit. It was also the case of the defendant that the Claims Inspector and the goods clerk of the Railway held an enquiry and found that 84 and 51 bags of the two consignments were destroyed by the mob. In the circumstances mentioned in the written statement the defendant denied his liability to pay the amount claimed by the plaintiff.

[2] The learned Subordinate Judge at Dhanbad, who tried the suit, held that the defendant was liable for the loss of 84 bags of masur and 51 bags of gram which were not delivered by the plaintiff. As the prices claimed by the plaintiff for the masur and gram were not dis-

puted the learned Subordinate Judge gave a full decree to the plaintiff. The defendant appealed to the District Judge and in appeal the learned District Judge held that in the circumstances of the case the defendant could not be made liable for the loss of the goods. Hence this second appeal.

[3] One of the grounds on which the learned lower Court has held that the plaintiff is not entitled to succeed in the suit is that according to clause (3), Appendix C, Railways Act, the railway receipt given by the Railway Administration for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Administration, and the signature of the consignee or his agent in delivery book at destination shall be evidence of complete delivery. The learned District Judge apparently was in error when he took this to mean that such signature of the consignee or his agent will be conclusive evidence of complete delivery and no other evidence will be permitted to be adduced to show that really there was no complete delivery. In the present case it is admitted by the Railway Company that the bags for the loss of which the suit had to be brought could not be taken away by the plaintiff's man because the goods-shed was closed at 5. P.M. There is evidence to show that the goods arrived at Jharia partly on the 16th and partly on 17th August 1942. Without any loss of time the plaintiff's representative wanted to take delivery. Before delivery could be completed the shed was closed by the Railway Company as it was getting late. That evening the shed was attacked by a large mob and some of the goods stored there were destroyed or looted. It was admitted by the defendant that the 135 bags in respect of which the suit was filed were either destroyed or looted away by the rioters. This being the position, I do not see how the defendant can rely on clause (3) of Appendix C, Railways Act, and ask any Court to draw the conclusion that complete delivery of the two consignments in question was taken.

[4] On behalf of the defendant-respondent it was contended that as there was a widespread loot and destruction of properties in the goods-shed, the learned District Judge who was the final Court of fact rightly arrived at the conclusion that the bags in question were lost during the raid on the goods-shed. That there were widespread disturbances throughout the country is a matter of history now and a Court can almost take judicial notice of that fact. But this alone will be of little avail to the defendant who has to prove in case of non-delivery as in the present case that these particular consignments were lost due to the acts of the rioters. The learned lower Court correctly formulated the question when he observed as follows at page 27 of the paper-book.

"The question, however, arises for consideration whether these very goods which were delivered to the consignee were looted during the disturbances that is say, in the night of 17-8-42."

Further on, the learned District Judge says that there is no evidence of eye-witnesses on the record to show that these very goods were actually looted. It will amount to an absurdity to ask for the evidence of eye-witnesses to prove the allegation of the loot of these very consignments. It is easy to imagine that while the loot and destruction went on no railway employee was allowed to go near the shed. Even if any spectator was present in the neighbourhood of the goods-shed it was not at all likely that he could notice as to which of the bags in the goods-shed were looted or destroyed and which of them were left behind by the rioters. As could be expected an inventory was taken after the incident. Naturally this was done by the Railway Company. The papers relating to the inventory must be in the possession of the Railway Company. Strangely enough, they have not been produced in this case. It is only natural that the non-production of these papers was severely commented upon in the lower Courts as well in this Court. The learned lower appellate Court seems to have been quite alive to the proposition of law that where a party can produce evidence, specially documentary, to prove a fact and it does not produce that document the Court should make adverse inference against such party. Then he observes that to make an "adverse inference is one thing and holding that the party has failed to prove its case is another." The learned lower Court then goes on to describe what must have taken place at the time of the alleged loot. As already indicated above, there was admittedly a raid on the goods-shed attended with loot and destruction. If the evidence in the case had been that whatever was in the shed at the time of the mob attack on it was either carried away or destroyed leaving nothing in the shed, then the matter would certainly have been different, for, the whole must always include a part, but the admitted facts in this case go to show that the alleged loot and destruction were in respect of only some and not of all that was in the shed. D. W. 3 Panchanan Chatterji who is an assistant goods clerk at Jharia Railway Station was examined on behalf of the defendant. He has proved two reports, Exs. E and Eq. These reports clearly go to show that an inventory of the goods left behind by the rioters was taken by the Claims Inspector with the help of the goods clerk. No doubt in the report

EX. F submitted by the goods clerk, Jharia, to the Inspector, Watch and Ward Department, Asansole, it is stated that 135 bags of the two consignments in question were looted away by the mob, but in the absence of the inventory this report which is in the handwriting of one Mr. J. B. Ray and has been proved by D. W. 3 Panchanan Chatterji cannot be safely relied on to exonerate the Railway Company. The learned District Judge was not quite right when he observed (vide page 30 of the paper-book) that in the circumstances of the case the only reasonable inference that can be drawn is that these goods were lost in the course of the loot of the goodsshed.

[5] In my opinion, the view taken by the learned District Judge is not correct and for the reasons stated above I would allow the appeal and restore the judgment and the decree of the learned Subordinate Judge. The appellant is entitled to his costs in all the Courts.

[6] **Manohar Lall J.**—I agree. Great reliance was placed before us that cl. (3), Appendix C., Railways Act, clearly lays down that when a consignee has handed over a railway receipt at the destination to the railway authorities, this amounts to an actual delivery of the goods, and thereafter the goods remain with the Railway Company at the risk of the consignee. I do not agree with this contention, because cl. (3), of Appendix C only says that the signature of the consignee in the delivery book at the destination shall be evidence of complete delivery. It does not say that it shall be the conclusive evidence of complete delivery. In the second place, my experience is that railway receipts are first handed over to the railway authorities and then after making enquiries in the books and go-downs they deliver goods to the consignee. Again it may well happen that after the railway receipt had been handed over to the authorities at the destination, the authorities took time for searching the goods and the closing time arrived and the goods then were left in the custody of the railway company in whose custody they were already from before. In my opinion, the position is exactly the same as the delivery of the goods has not been made over to the consignee.

D.S. *Appeal allowed.*

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## A. I. R. (35) 1948 Patna 244 *[C. N. 89.]*

MEREDITH AND SINHA JJ.

*Dilo Rana and another*—*Defendants*—*Appellants* v. *Munshi Kunj Behari Prasad and others, Plaintiffs and others, Defendants* — *Respondents.*

A. F. A. D. No. 1029 of 1944, Decided on 21-3-1947, from decision of Addl. Sub Judge, Hazaribagh, D/-3-8-1944.

**Civil P. C. (1908), O. 22, R. 9 —Previous partition suit abating — Fresh suit is maintainable.**

**A partition is a recurring cause of action so long as the property remains joint. Hence in such a case the plaintiffs' right of partition will subsist even after the abatement of a previous suit for partition. 13 All. 309; 28 All. 627, 2 A. I. R. 1915 All. 1, 10 C. W. N 839 and 5 A. I. R. 1918 Cal. 393, *Rel on*; 1 A. I. R. 1914 Mad. 170 and 15 A. I. R. 1928 Rang. 73, *Disting*,** [Para 4]

Annotation ('44-Com) C. P. C. S. 11 Note 36 pt. 11, and O. 22, R. 9, N. 3.

*Cases referred*:—

1. ('15) 38 Mad. 643: 1 A.I.R. 1914 Mad. 170: 22 I. C. 260, Sheshamma v. Venkata Surya Narayana.
2. ('27) 5 Rang 785 : 15 A. I. R. 1928 Rang. 73 : 108 I. C. 809, Maung Ba Tu v. Ma Thet Su.
3. ('91) 13 All. 309, Nasrat-ul-lah v. Mujib-ul-lah.
4. ('06) 28 All. 627, Bisheshar Das v. Ram Prasad.
5. ('15) 37 All. 155 : 2 A. I. R. 1915 All. 1 : 27 I. C. 694, T. C, Mukherji v. Afzal Beg.
6. ('06) 10 C. W. N. 839, Madon Mohan v. Baikantanath.
7. ('18) 27 C. L. J. 441 : 5 A. I. R. 1918 Cal. 393 : 45 I. C. 705, Durga Charan v. Khundkar.

*Sarju Prasad and T. K. Prasad*—for Appellants.
*G. C. Das, Imam Ali and A. K. Chatterji*—for Respondents.

**Sinha J.**—This is a defendants' second appeal against a decision of the learned Subordinate Judge of Hazaribagh reversing that of the Munsif of Giridih in a suit for partition.

[2] In so far it is necessary to determine this appeal the facts may shortly be stated as follows. There were two brothers, Sibban and Horil, who owned and possessed a moiety share in a certain holding bearing *Khata* No. 13. The plaintiffs respondents purchased the interest of Horil's branch in that *Khata*, from his son named Tojo. The plaintiffs had instituted a previous suit for partition, but as the heirs of one of the several defendants named Daso Rana had not been substituted in place of the deceased defendant the suit had naturally abated, but the plaintiffs took the precaution of obtaining leave from the Court to institute a fresh suit after withdrawing that suit on the ground that it had become defective on account of defect of parties. That leave was granted, and the suit out of which this appeal arises was instituted for the same relief, namely partition. The defendants-appellants contested the suit on several grounds which it is no more necessary to recount except the ground of maintainability. Their contention on the question of law was that the second suit was not maintainable in view of the fact that the previous suit really had abated and that the plaintiffs obtaining permission from the Court to withdraw from the suit with liberty to bring a fresh one did not make any change in the legal position.

[3] The Court of first instance gave way to this contention and dismissed the suit, but the lower appellate Court reversed the decision on

the ground substantially that a suit for partition instituted subsequently to the withdrawal of the former suit was based on a different cause of action from that alleged in the previous suit for partition, and that, therefore, the present suit was not, as alleged by the defendants, had on the ground that the previous suit had abated for non-substitution. Hence this second appeal.

[4] Mr. Sarju Prasad appearing on behalf of the appellants has contended on the authority of the decisions of the Madras High Court in 38 Mad. 643[1] and of a single Judge of the Rangoon High Court in 5 Rang. 785[2] that the abatement of the previous suit had the effect of making the second suit not maintainable because it was again a suit for partition, that it to say, exactly the same suit which had proved infructuous in the previous litigation between the parties. It is enough to point out that the decision of the Madras High Court did not relate to a suit for partition. Hence the question of recurring cause of action had not to be considered in that case. In the Rangoon High Court case also, as pointed out by the learned Judge of that Court it related to the question of rights of the heirs of a deceased Burmese Buddhist, and his Lordship appears to have made distinction between the legal position arising in that case and the position arising out of a suit for partition relating to joint family property of a Hindu, or the joint property of a Muslim as discussed in the several cases referred to in that very decision, namely, 13 ALL. 309,[3] 28 ALL. 627,[4] 37 ALL. 155,[5] 10 C. W. N. 839[6] and 27 C. L. J. 441.[7] Those Allahabad and Calcutta decision are authority for the proposition that partition is a recurring cause of action so long as the property remains joint. In this case it has never been determined by any competent Court that the property was either partitioned previously, or that the plaintiffs had by any process known to law lost their right of partition. That being so ,it must be held that the plaintiffs' right of partition subsisted even after the abatement of the previous suit for partition instituted by them. It must, therefore, be held that the decisions relied upon on behalf of the appellants are of no assistance to them for the purposes of the present case.

[5] In my opinion, the lower appellate Court rightly held that the suit was maintainable in spite of the abatement of the previous suit for partition. The appeal is accordingly dismissed with costs.

**Meredith J.** — I agree.

D.H. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 245** *[O. N. 90.]*

MERIDITH AND SINHA JJ.

*Inderchand Kajriwal* — *Decree-holder* — *Appellant* v. *Bansropan Sahu and others* — *Judgment-debtors* — *Respondents.*

A. F. O. O. No. 397 of 1945, Decided on 21-3-1947, from decision of Sub-Judge, Shahabad, D/-3-10-1945.

(a) Civil P. C. (1908), Ss. 40 and 42—Decree of Calcutta High Court (O. S.) transferred to Bihar for execution—Rights and liabilities of parties are governed by Bengal Money Lenders Act (X of 1940) and not Bihar Money-Lenders Act(VII of 1939).

Where a decree obtained on the original side of the Calcutta High Court is transferred for execution to the Shahabad Court in the Province of Bihar, the transferee Court has to execute it in accordance with the law of procedure obtaining in the Courts in Bihar but has to determine the rights and liabilities of the parties in accordance with the substantive law obtaining in the Court which passed the decree, that is the transferor Court. Consequently the judgement-debtors have no locus standi to make an application under Ss.13 and 14, Bihar Money Lenders Act. The rights and liabilities of the parties are governed by the Bengal Act (X of 1940) which regulates the transactions of money-lending in Bengal and it is this Act which has to be referred to: 29 A.I.R. 1942 Pat. 128, 17 Cal. 491 and 36 Mad. 108, *Ref.* [Paras 5 & 8]

Annotation:—('44-Com) Civil P.C., S. 40 N. 1 and S. 42 N. 1.

(b) Bengal Money-Lenders Act (X of 1940), S. 2 (12) and (4)—Commercial loan—Act does not apply.

Where the transaction amounted to a commercial loan, it was not a loan within the meaning of S. 2(12) and therefore the transaction did not attract the other provisions of the Act. [Para 5]

*Cases referred:*—

1. ('42) 29 A. I. R. 1942 Pat. 128 : 197 I. C. 627, Ranganadham v. Pannacharamma.
2. ('90) 17 Cal. 491, Tincowrie Dawn v. Debendra Nath.
3. ('13) 36 Mad. 108 : 11 I. C. 635, Krishna Dass v. Alumbi Ammal.

*Mahabir Prasad, D. N. Varma and Kanhaiyaji*—for Appellant.

*Murtaza Fazal Ali*—for Respondents.

**Sinha J.**— This is a decree-holder's appeal from a decision of the learned subordinate Judge of Shahabad in execution proceedings allowing the judgment-debtors' objection that the properties sought to be proceeded against should be valued under the provisions of S. 13 of Bihar Money-Lenders Act, and only a sufficient portion thereof be sold in accordance with the provisions of S. 14 of that Act.

[2] It appears that the decree-holder appellant obtained a decree for a large sum of money in the Calcutta High Court on its original side. The decree recited that the suit was "to recover Rs. 33,918-11-6 due for the price of goods sold and delivered with interest." That decree was transferred to the Shahabad Court for execution, at the instance of the decree-holder appellant. In the Shahabad Court the judgment-debtors, who appear to have been a family firm carrying on

business in cloth, etc., made an application under Ss. 13 and 14 of the Bihar Money-Lenders Act, alleging that "the claim of the decree-holder was based upon dues for balance of the value of goods purchased and despatched by the decree-holder as commission agent to the judgment-debtors including his commission, adhatdari, etc., and interest and costs." Then the objectors proceeded to give details of the arrangement between the parties whereby the agent (the decree-holder) had supplied goods on certain terms, the judgment-debtors agreeing to pay interest at 9 per cent. per annum on the outstanding amounts on an account being taken every year of the transactions between the parties. Those allegations were supported by an affidavit sworn to by one of the judgment-debtors in paragraph 4 of which it is stated that the decree-holder is a registered money-lender under the Bihar Money-Lenders Act (Act VII of 1939). To their application aforesaid the judgment-debtors annexed a copy of the plaint in Suit No. 1519 of 1934 on the original side of the Calcutta High Court, which resulted in the decree under execution. It would appear from the plaint that the plaintiff decree-holder was commission agent for the purchase of various kinds of piece-goods as required from time to time by the defendants to be despatched to their two shops in the district of Shahabad. The terms on which this arrangement had been arrived at are also recited in detail. We are not concerned with those details, but one thing is clear that the nature of the transaction between the parties was that the plaintiff in his capacity as commission agent had agreed to purchase on behalf of the defendants, firm, piece-goods and he advanced money for those purchases on interest at 9 per cent. per annum.

[3] The learned Subordinate Judge examined the nature of the transaction in detail, and came to the conclusion that the Bihar Money-Lenders Act applied to the transaction and that therefore, Ss. 13 and 14, Bihar Money-Lenders Act would operate in respect of the decree under execution. In that view of the matter, he allowed the application and directed that the properties be valued as prayed for by the judgment-debtors. Hence this appeal by the decree-holder.

[4] Mr. Mahabir Prasad on behalf of the appellant contended, in the first instance, that the decree having been passed by the Calcultta High Court on its original side must be executed by the Shahabad Court only in accordance with the provisions of the Bengal Money-Lenders Act (X of 1940), and not in accordance with the Bihar Money-Lenders Act which, according to him, could not apply for two reasons, firstly, that the decree being of the Bengal Court could be executed in accordance with the law of that province and secondly, because it was not a loan within the meaning of the Bihar Money-Lenders Act which resulted in the decree of the Calcutta High Court.

[5] If we hold that the first contention raised on behalf of the appellant is well founded in law we need not go into the second question whether the transaction in substance was a loan within the meaning of the Bihar Money-Lenders Act. Hence the first question to be determined in this appeal is whether the Shahabad Court in executing the decree is to execute it in accordance with the provisions of the law as it it prevails in Bengal. Under S. 40, Civil P. C. which was added for the first time to the Code by the Act of 1908, the decree has to be executed in such manner as may be prescribed by the "rules" in force in Bihar. Now, what is the significance of the "rules" referred to in that section? In my opinion, it must have reference to the rules framed under the Code of Civil Procedure by the different High Courts in pursuance of the powers conferred upon them by the Code itself. "Rules" in that section, in my opinion, have not the larger significance of rules of law inclusive both of adjectival as also substantive law. It may also be contended that S. 42, Civil P. C. confers upon the transferee Court, that is the Shahabad Court in this case, the same powers in executing the decree as if it had been passed by itself. But the "powers" referred to in this section refer to the powers of the executing Court in relation to the procedure to be followed, and not in relation to the substantive law to be administered in executing the decree. In this connection reference may be made to the decision of a Division Bench of this Court in A. I. R. 1942 Pat. 128[1] in which the Division Bench laid it down that S. 42, Civil P. C. deals with the manner of execution and leaves the matter of limitation to be governed by the Limitation Act, and that the period of limitation applicable to the execution of the decree depended upon the character of the Court which passed the decree, and not on that of the Court executing it on transfer. In this connection reliance was placed upon a decision of the Calcutta High Court in 17 Cal 491.[2] To the same effect is the decision of a Division Bench of the Madras High Court in 36 Mad. 108.[3] Hence it may be said that the preponderance of judicial authority appears to be in favour of view that the transferee Court in executing the decree transferred to it for execution has to do so in accordance with the law of procedure obtaining in that Court, but has to determine the rights and liabilities of the parties in accordance with the substantive law obtaining in the Court which passed the decree, that is to say, the transferor

Court. That being so, it must be held that the Bengal Act X of 1940, which regulates the transactions of money-lending in Bengal, must be referred to in order to determine the rights and liabilities of the parties before us. In that Act a "commercial loan" has been excepted from the definition of a loan as contained in cl. (12) of S. 2 of the Act, and cl. (4) of that section defines a "commercial loan" in these terms :— "'commercial loan' means a loan advanced to any person to be used by such person solely for the purpose of any business or concern relating to trade, commerce, industry, mining, planting insurance, transport, banking or entertainment, or to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature whether as proprietor or principal or agent or guarantor." It will appear from the definition quoted above that transaction leading up to the decree under execution in the present case was entirely a commercial loan and, therefore, excepted from the operation of the Bengal Money-Lenders Act. In that view of the matter, it must further be held that in accordance with the provisions of that Act the transaction which led up to the decree of the Calcutta High Court was not a loan so as to attract the operation of the other provisions of the Act.

[6] In that view of the matter it is not necessary, in my opinion, to determine the further question raised by Mr. Mahabir Prasad whether the transaction could come within the purview of the definition of a loan as contained in the Bihar Money-Lenders Act.

[7] As a result of these considerations it must be held that the decision appealed against is erroneous in law, and that the judgment-debtors had no locus standi to make the application under Ss. 13 and 14, Bihar Money-Lenders Act. The appeal is accordingly allowed with costs here and in the Court below and the application in the Court below stands rejected.

[8] **Meredith J.**—I agree. In my opinion, it is quite impossible to regard Ss. 13 and 14, Bihar Money-Lenders Act, taken together as merely prescribing rules of procedure for execution. On the contrary, a substantive right is enacted by those provisions for the protection of the judgment-debtor. It is a matter of the substantive rights of the parties, that is of substantive law. As such the current of authority seems to be that in such matters the law of the province where the decree was passed will be applicable, and not the law of the province in which the decree is being executed. Section 40, in my opinion, refers only to procedure in execution, and can have no relation to the substantive rights of the parties under enactments such as the Money-Lenders Acts, which are framed to afford protection to debtors.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 247** *[C. N. 91.]*

SINHA AND MUKHERJI JJ.

*Asoke Chandra Mazumdar* — *Appellant* v. *Chota Nagpur Banking Association Ltd.* — *Respondent.*

A. F. A. D. No. 1048 of 1944, Decided on 26-8-1947, from decision of Judicial Commissioner, Ranchi, D/-1-6-1944.

(a) Civil P. C. (1908), S. 100 — Finding of fact — Burden of proof wrongly placed—Inferences not warranted by evidence on record — Finding is not binding.

Where the onus of proof is wrongly placed on a party by the lower appellate Court and its findings of facts are based on inferences drawn from circumstances and there is no tangible evidence in support of them, those findings are not binding in second appeal. A Court of justice should not draw inferences which are unwarranted by evidence on record. Such an inference is all the more undesirable where the person against whom it is drawn was neither a party to the suit nor even a witness. [Paras 5, 7, 14]

Annotation : — ('44-Com.) Civil P. C., Ss. 100 and 101, N. 53.

(b) Benami—Evidence.

Per *Sinha J.* — Findings of benami must be based on tangible evidence, and not on mere suspicion, however strong. [Para 14]

(c) Civil P. C. (1908), O. 21, R. 63 — Suit under —Onus of proof — Transfer in favour of defendant attacked as sham—Onus was on plaintiff (decree-holder).

Where upon the success of a claimant in a proceeding under O. 21, R. 58, on the basis of a sale-deed, the decree-holder brings a suit under O. 21, R. 63 and pleads that the sale was sham and the transaction was benami, the onus of proving that the transaction was sham lies heavily on the plaintiff and not upon the defendant to prove that the transaction was not benami. [Paras 4, 14]

Annotation : — ('44-Com.) Civil P. C., O. 21, R. 63, N. 19.

(d) Transfer of Property Act (1882), S. 54 — Advance by one brother to another—Sale in lieu of such loan cannot be presumed to be benami—Benami.

Where money has been paid it must either be repaid or properly accounted for. An advance by one brother to another should stand on the same footing as an advance made by one person to another who is wholly unconnected with him. There is no presumption in law that an advance by a brother to another brother is a gift. Where a brother is the creditor, he may not sue the debtor brother, particularly where the latter is in straitened circumstances. Where, therefore, in lieu of advances made by one brother to another the latter executes a sale deed in favour of the former, it cannot be presumed that the sale was benami. Such a sale is for good consideration even if some of the advances were barred by limitation. [Para 8]

Annotation :—('45-Com.) T. P. Act, S. 54, N. 12.

*Cases referred* :—

1. (1914) 1914 A. C. 398 : 83 L. J. Ch. 465 : 111 L. T. 1, Sinclair v. Brougham.

2. ('36) 15 Pat. 433 : 23 A. I. R. 1936 Pat. 370 : 161 I. C. 171, Bhagwati Saran v. Rai Krishunji.

*S. N. Basu, S. Mustafi and J. C. Mullick* — for Appellant.

*B. C. De* — for Respondent.

**Mukherji J.**—In this second appeal one of the defendants is the appellant. The original judgment which is of the year 1939 was passed by the Additional Subordinate Judge of Palamau. The suit was decreed and there was an appeal to the Judicial Commissioner of Ranchi. The appeal was dismissed and dismissal of the appeal led to a second appeal to this Court. The second appeal (78 of 1943) was heard by Varma J. and my learned brother. Their Lordships by their order dated 10-2-1944 set aside the judgment and decree of the lower appellate Court and sent back the appeal to be reheard. The learned Judicial Commissioner of Ranchi has again dismissed the appeal.

[2] The facts of the case have been elaborately stated in the judgment of the trial Court as also of the appellate Court. They may be stated within a brief compass as follows : Defendant 2 Kshirode Chandra Mazumdar is the uncle of defendant 1, Asoke Chandra Mazumdar, the present appellant. Probodh Chandra Mazumdar, father of Asoke Chandra Mazumdar, is an elder brother of Kshirode Chandra Mazumdar. Defendant 2 was a contractor working under the Daltongunj Municipality and the District Board of Palamau. The plaintiff-bank (The Chotanagpur Banking Association Ltd.) has its head office at Hazaribagh and a branch office at Daltongunj. Kshirode Babu took loans from the plaintiff off and on. His business apparently did not flourish and he became more and more indebted to the plaintiff-bank. About the year 1932, Kshirode Babu's financial condition became very bad indeed. His liabilities to the Bank came to Rs. 14,000 or so. The Bank had to bring a suit to recover its dues and the suit was decreed on 24-11-1933. In the execution proceedings a house of the judgment-debtor situate in Nayatoli, a mahalla of Daltongunj town was attached. Defendant 1, Asoke Chandra Mazumdar claimed the house and his claim was allowed. The Bank then had no alternative but to file a suit under O. 21, R. 63, Civil P. C. This was title Suit No. 6 of 1938. The suit was contested by defendant 1 Asoke Chandra Mazumdar alone. His defence was that defendant 2 transferred the house in question to him in consideration of certain sums of money which defendant 1's parents had advanced to defendant 2. Defendant 1 also claimed to be in possession of the house and to have effected improvement to it.

[3] The learned Subordinate Judge who tried the suit framed seven issues of which Issue 4 was as follows :

"Is the purchase of the house in suit by defendant 1 for valid consideration, or is the transaction a mere benami or collusive one ? Is defendant 1 in possession and enjoyment of the property ?"

[4] After considering the evidence and circumstances, the learned Additional Subordinate Judge came to the finding that the sale in favour of defendant 1 was a benami transaction. As indicated in an earlier portion of this judgment, the First Appellate Court concurred with the trial Court in its findings and dismissed the appeal. In second appeal, it was considered necessary to remand the appeal because the learned Judicial Commissioner who heard the appeal wrongly placed the onus upon the present appellant. The appellant being the vendee and there being already a decision of a competent Court in his favour, the onus was certainly not on him to prove that the transaction was not benami in character. It was for the plaintiff Bank to establish that the apparent was not the real state of things.

[5] Before I proceed further, I may state a few facts regarding the consideration of the sale-deed in favour of the present appellant. The sale-deed which is dated 15-8-1932 is a registered document and the consideration is Rs. 5000. According to the recitals in the sale deed (Ex. A) defendant 2, the vendor, had borrowed Rupees 3546-1-6 and two further sums of Rs. 1667-10-2 and Rs. 1000 from the parents of the present appellant. Both the father and the mother of the appellant had accounts in Banks and the evidence on record goes to show that the three sums of money just referred to were received by defendant 2 through Bank. Two out of these three sums, namely, Rs. 3546-1-6 and Rs. 1657-10-2 relate to the years 1927 and 1928. Admittedly they were barred by limitation in the year 1932 when the sale deed Ex. A was executed. The sum of Rs. 1000 however, was not barred. In the order of remand already mentioned, it was pointed out that even barred debts could be good consideration for a sale deed. The learned Judicial Commissioner who heard the appeal after the order of remand was inclined to think that the sum of Rs. 1000 was paid by the father of appellant to defendant 2, his own brother, by way of gift. Defendant 2 had to marry a daughter and as his financial condition was none too good, the learned Judicial Commissioner inferred that the amount was paid by his elder brother to enable him to meet the necessary expenses in connection with the marriage. So far as the two more substantial items, namely, Rs. 3546-1-6 and Rs. 1667-10-2 are concerned, the learned Judicial Commissioner has observed that there is no evidence to show that they were advanced as loans. At more than one place in his judgment he has

commented on the absence of Probodh Babu and Kshirode Babu from the witness-box. His comment is that they are the persons who could have explained the circumstances in which the alleged loans were advanced. The learned Judicial Commissioner was not inclined to attach much importance to the evidence of the appellant on the ground that in 1927-28 he was nothing more than a callow young man. It is not the finding of the trial Court or of the first appellate Court that none of the three items of money were received by defendant 2. In fact in view of the documents on the record such a finding was not possible. The learned Judicial Commissioner who heard the appeal on remand has more than once in his judgment observed that it is possible that the father of the appellant who was a Deputy Magistrate had a share in the business carried on by defendant 2 and that the sums advanced by him represented his share of the capital in the business. This is surmise pure and simple. A Court of justice should not draw inference which are unwarranted by evidence on record. In the present case such an inference was all the more undesirable because the person against whom it was drawn was not a party to the suit. He was not even a witness. The inference, as one can plainly see, affected the integrity of Probodh Babu as a Government servant and this was another reason why the learned lower Court should have been more cautious in the matter. It is true, law is no respector of persons, but at the same time Courts of justice should remember that no person should be injured behind his back.

[6] On behalf of the appellant it has been contended that the learned Judicial Commissioner again wrongly placed the onus on the appellant to prove that the amounts advanced by his parents to Kshirode Babu were in the nature of loans. From what has been stated above, it will be seen that the order of remand was necessary because the former Judicial Commissioner who had heard the previous appeal had wrongly thrown the onus on the appellant to show that the sale deed was for consideration. In my opinion there is some force in the contention of the learned advocate for the appellant that the same mistake has been committed again. At page 62 of the paper-book, the learned first appellate Court has observed that one seeks in vain for evidence that the amounts advanced by the parents of the appellant were loans, it is with regard to the amount of Rs. 1000/- that the learned Judicial Commissioner has recorded a definite finding that it must have been a gift. So far as the other two amounts are concerned, there is no such clear finding. The learned Judicial Commissioner appears to have been under the impression that there is no evidence to prove that the amounts were advanced as loans; it should be taken that they were paid either as gift or as capital for the supposed interest of the parents of the appellant in the business which was being carried on by Kshirode Babu. The order of remand made it sufficiently clear that the onus was upon the plaintiff-respondent to prove that the sale deed was without consideration. I may refer to page 48 of the paper book where my learned brother observed as follows; "in my opinion the judgments of the Courts below have proceeded upon an erroneous assumption and inferences wrongly drawn against the appellant from non-examination of certain witnesses when the burden of proof lay entirely on the plaintiff to prove positively that the transaction was a mere sham."

At page 47 of the paper-book occur the following observation.

" Hence in my opinion, there was the treble onus on the plaintiff in this case to prove to the satisfaction of the Court that the sale deed in his favour was a mere sham. In such a situation the onns must lie very heavily on the plaintiff to prove that the transaction was a benami one".

The sale deed in question was apparently for good consideration if the amounts advanced in this case can be treated as loans. It was for the plaintiff respondent to prove that they were not loans. The learned Judicial Commissioner in his judgment has referred to certain circumstances and from them has come to the conclusion that in all probability the advances were not loans. The judgment does not indicate that the learned Judicial Commissioner placed the onus on the plaintiff-respondent and examined the evidence and circumstances in that light.

[7] Mr. B. C. De arguing for the pfaintiff-respondent has contended that the whole question before the first appellate Court was whether the sale deed embodies a genuine or a sham transaction and that the finding being one of fact cannot be challenged in second appeal. I am inclined to think that for the reason stated in the foregoing paragraph of this judgment the contention of Mr. De has no force. The onus of proof was wrongly placed on the appellant and therefore this Court is quite competent to interfere in second appeal.

[8] On behalf of the appellant it has been argued that all advances of money are to be treated as loans whether or not there is any written or implied contract between the parties. There is no direct authority on this point. There is, however, a case reported in 1914 A. C. 398, [1] in which certain principles have been laid down and I am inclined to think that these principles govern a case like the present one. The House of Lords case has also been referred to in 15 Pat. 439.[2] In 1914 A. C. 398, [1] a certain Society was formed in England under the Building Societies

Act. The Society was empowered by its rules to borrow to an unlimitted extent and it started and developed a banking business. The Society which was formed in 1851 was ordered to be wound up in 1911. When the question of distribution of assets came up for consideration, it was found that the society had no legal authority to carry on banking business. It was held that the depositors were entitled to recover monies paid by them although the carrying on of the banking business was declared to be ultra vires. The Patna case was one under the Revenue Sales Act. Under S. 31 of the Act certain surplus sale proceeds were paid by the Collector to persons entered in the Collector's register. The estate had already been sold and purchased by another person. When the rightful owner brought a suit to recover the surplus sale proceeds, a Division Bench of this Court held that such a suit was maintainable. In the course of the judgment their Lordships referred to the case in 1914 A. C. 398[1] already mentioned and quoted the following few lines from the speech of Lord Haldane delivered in that case;

"In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warrantee and bills of exchange and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment."

Although the facts of the reported cases are different from those of the present case, the guiding principle in both the cases must be the same, namely, that where money has been paid, it must either be repaid or properly accounted for. An advance by one brother to another should stand on the same footing as an advance made by one person to another who is wholly unconnected with him. There is no presumption in law that an advance by a brother to another brother is a gift. Where a brother is the creditor, he may not sue the debtor brother, particularly where, as in the present case, the latter is in straitened circumstances.

[9] As already stated above, the learned Judicial Commissioner has referred to a number of circumstances and has drawn his conclusion therefrom. Apparently the relationship between the parties considerably weighed with him. Another fact also seriously considered by him is that Kshirode Babu observed close secrecy regarding the execution of the sale deed and did not disclose anything about the transaction to the plaintiff Bank. The fact that Kshirode Babu did not vacate the house in question also weighed with the learned first appellate Court. The learned Judicial Commissioner also seriously thought that out of the three, two debts had already become barred. All these circumstances are capable of being satisfactorily explained away. As pointed out in the order of remand a debtor may prefer one creditor to another. As regards possession, the evidence is that not only Kshirode Babu but some of the other members of the family of the appellant also lived in the house. Where the minority transaction is between two brothers, rarely if ever the creditor brother will behave like a Shylock who must have his pound of flesh. If after the sale of the house Kshirode Babu who was already a broken man was allowed to live in the house, it is something one can very well understand. The father of the appellant had to take another house because he was re-called to service and he wanted a house where he could also locate his office. These are all facts which one can gather from the record. I am referring to the evidence in this case because already there has been a remand and any further remand will be expensive for the parties. While dealing with the attendant circumstances of the case, the learned lower Court has observed that both Probodh Babu and his wife (the parents of the appellant) had natural affection for Kshirode Babu. This is not quite corrrct. Probodh Babu may have natural affection for his brother but his wife would have no natural affection for her brother-in-law because there can be no natural ties between the two.

[10] The learned Judicial Commissioner did not refer to the proceedings of the parties on the question as to whether the amounts were advanced as loans. There is nothing within the four corners of the plaint to show that the advances were not loans. It would appear that the plaintiff respondent knew about the sale deed before the institution of the suit. In the sale deed there is a clear recital about the three items of advances. Yet one finds that it is nowhere stated in the plaint that these advances were really not made or that they were made by way of gift. In the evidence also, the two witnesses for the plaintiff examined in this case did not say a word to show or suggest that there were no loans.

[11] The learned Judicial Commissioner himself also appears to have felt that the evidence and circumstances are not sufficient to justify a conclusion that the amounts in question were paid as gifts. This is undoubtedly the reason why he has evolved a third theory that perhaps Probodh Babu had a share in Kshirode Babu's business and the amounts advanced represented Probodh Babu's capital investment.

[12] Upon a consideration of the evidence on record and the attendant circumstances, I am of opinion that at least two of the advances, namely, those of Rs. 3546 odd and Rs. 1667 odd were loans taken by Kshirode Babu from the parents of the appellant. These two make up a total of over Rs. 5000 and the sale deed in question is for Rs. 5000. We may leave out the item of Rs. 1000 because as already pointed out there is a definite finding of the learned lower Court that this amount must have been paid as a gift.

[13] The appeal, therefore, succeeds and it is allowed with costs throughout.

[14] **Sinha J.** — While delivering the judgment of this Court on the previous occasion setting aside the judgment of the lower appellate Court and remanding the case for a fresh decision, I pointed out that the plaintiff company had a very heavy burden on it of proving that the transaction impugned was a mere sham. It should be remembered that the case made out in the plaint by the plaintiff company was that the transaction was a mere nominal one without any consideration. The defendant was the successful claimant in a proceeding under O. 21, R. 58, Civil P. C. He had succeeded in his claim based on the sale deed in question. That sale deed disclosed three items of consideration. It was not alleged in the plaint either that these were sums advanced to Kshirode Babu by his brother or his brother's wife on account of the capital in the joint venture of the two brothers or that those items, or any one of them, represented a mere gift by one brother to another brother, or, as the case may be, by the brother's wife to the brother-in-law, and that is a reason why the learned Judicial Commissioner on the first occasion came to the conclusion that all those items of consideration were fictitious in the sense that there were absolutely no monetary dealings between the two brothers. After remand, the lower appellate Court has conjectured, as I can see from its judgment, that either these sums represented gifts to Khirode Babu or contributions of capital in a joint venture of the two brothers. No tangible evidence was pointed out to us for such findings. Hence it is clear that these findings are not bindings upon us in second appeal. If there were tangible evidence, and not what has been characterized as circumstances, in support of the conclusion that those items mentioned in the sale deed were either acts of gift or contribution to the joint funds of a partnership business, the finding would have been unassailable in second appeal. But it appears that no foundation was laid in the pleadings or even in the evidence for such conclusions which must be characterized as mere guess work. Though *benami* transactions are common in this country, it has been repeatedly pointed out by their Lordships of the Judicial Committee that findings of benami must be based on tangible evidence, and not on mere suspicion, however strong. The judgment of the lower appellate Court suffers from another infirmity in so far as it has in effect again thrown the onus of proof on the defendant to prove that the transaction, on the basis of which his claim had been allowed by the executing Court, was a real transaction. In view of these considerations, it must be held that the judgment of the lower appellate Court is vitiated in so far as it has come to a finding that the sale deed was not real transaction. I would, therefore, agree with my learned brother that the appeal should be allowed and the suit dismissed with costs throughout including costs of the two hearings of the appeal in the Court below and in this Court.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 251** *[C. N. 92.]*

SHEARER AND REUBEN JJ.

*Rachpal Maharaj—Appellant* v. *Bhagwandas Daruka and others—Respondents.*

A.F.O.D. No. 218 of 1944, Decided on 11-3-1947, from decision of Sub-Judge, Darbhanga, D/- 28-8-1944.

(a) Evidence Act (1872), S. 91—Equitable mortgage—Letter recording transaction and creating mere evidence of circumstances—No operative portion—Oral evidence to prove transaction held admissible—Letter though unregistered held admissible—Registration Act (1908), Ss. 17 and 49.

Oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. The writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. Where a memorandum accompanying a deposit of title deeds and executed on the same day can be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which an equitable mortgage is created and would come within S. 17, Registration Act. But where it is clear on consideration of the instrument that it is nothing more than a record of the transaction which has taken place between the parties and creates evidence of the circumstances in which the little deeds were deposited and there is no provision which can be described as an operative provision, it does not require registration, and it does not exclude oral evidence of the mortgage transaction : 18 A. I. R. 1931 P. C. 36 and 20 W. R. 150, *Rel. on*; 10 A. I. R. 1923 P. C. 50; 26 A. I. R. 1939 P. C. 167; 7 A. I. R. 1920 Cal. 312; 7 Beng. L. R. (O. C.) 55 and 24 A. I. R. 1937 Cal. 741, *Considered.* [Paras 4 & 6]

(b) Evidence Act (1872), S. 114—Non-production of evidence—Account books relevant to defendants' case—Defendants in possession of books—On non-production Court held justified in drawing inference adverse to defendants.

Where the defendants not only denied the correctness of the plaintiff's claims but went so far as to assert that, on the contrary, it was the plaintiff who owed them money, the account books of the defendants were very relevant documents and where the defendants maintai-

ned the accounts and the accounts for the last twelve years were in existence and in the possession of the defendants, the Court was right iu attaching great significance to the failure of the defendants to put these documents in evidence and was justified in drawing an inferenee adverse to the defendants: 32 A. I. R. 1945 Pat. 453, *Disting.* [Para 8]

*Cases referred:*—

1. ('73) 20 W. R. 150, Meer Mahomed Kazen Jowhurry v. Khetoo Debee.
2. ('23) 50 I. A. 77 : 10 A. I. R. 1923 P. C. 50 : 1 Rang 66 : 50 Cal. 338 : 71 I.C. 650 (P. C.), Subramanian v. Lutchman.
3. ('39) 26 A. I. R. 1939 P. C. 167 : I. L. R. (1939) 2 Cal. 243 : I. L. R. (1939) Kar. P.C. 287 : 66 I. A. 184 : 181 I. C. 935 (P.C.), Hari Shankar v. Kedar Nath.
4. ('20) 24 C. W. N. 599 : 7 A. I. R. 1920 Cal. 312 : 57 I. C. 686, Bhairab Chandra v. Anath Nath De.
5. ('71) 7 Beng. L. R. (O.C.) 55, Dwarka Nath v. Sarat Kumari.
6. ('37) 24 A. I. R. 1937 Cal. 741 : I. L. R. (1938) 1 Cal. 187 : 176 I. C. 580, Ebrahim Hazi v. Official Trustee.
7. ('31) 58 I. A. 68 : 18 A. I. R. 1931 P. C. 36 : 54 Mad. 257 : 131 I. C. 328 (P. C.), Sundarachariar v. Narayana Ayyar.
8. ('45) 32 A. I. R. 1945 Pat. 453 : 24 Pat. 379, Mohan Bikram Shah v. Deonarain Mahto.

*Janak Kishore, Rai Inder Behari Saran and Krishna Prakash Sinha*—for Appellant.

*S. N. Banerji, R. Misra and S. C. Mukherji for S. A. Ahmad*—for Respondents.

**Reuben J.**— This is an appeal by defendant 1 Rachpal Maharaj against a decree for sale on the foot of an equitable mortgage.

[2] The plaintiffs-respondents carry on business in Calcutta under the name of Thanmal Chunilal. They sued on the allegation that the defendants form a joint family carrying on a joint family business and governed by the Mitakshara law, with the defendant-appellant as its karta, and have been carrying on monetary transactions for a long time with the plaintiffs. They allege that the equitable mortgage was created by defendant 1 by the deposit of the title deeds in Calcutta on 23-10-1936, as security for the amount found due on the transactions between the parties up to date and for the transactions to be entered into in future. The documents are set out in schedule 2 to the plaint and the property covered thereby is given in schedule 1. The claim was for Rs. 10,322-2-6 with interest at nine annas per hundred rupees per month compoundable with yearly rests. The main defence set up by defendant-appellant was, firstly, that there was no equitable mortgage as alleged, and that the deeds in question were made over to the plaintiffs at Darbhanga not as security for transactions between the parties but merely for the purpose of safe custody, as a misunderstanding had arisen between defendant 1 and the other defendants and he was afraid that the other defendants might deprive him of these documents; secondly, that, on transactions between the parties, the defendants were the creditors and not the debtors of the plaintiffs, and, thirdly, that there was no stipulation regarding the payment of interest, compound or simple. All these contentions were negatived by the subordinate Judge, and he decreed the suit accordingly, allowing interest at six per cent. per annum pendente lite future interest at the same rate. On the creation of the equitable mortgage by the deposit of the title deeds in Calcutta, the plaintiffs have adduced evidence, which the Subordinate Judge has rightly characterised as unimpeachable, and the correctness of his finding of facts on this point has not been challenged before us. Only three contentions were pressed: firstly, that the suit must fail because the contract between the parties was reduced to writing in the shape of a document (Ex. 3), which must be excluded from evidence under the provisions of Ss. 17 and 49, Registration Act and itself excludes oral evidence of the contract under the provisions of S. 91, Evidenc Act; secondly, that the plaintiffs are not entitled to any interest previous to the filing of the suit; and thirdly, that the Subordinate Judge was wrong in accepting as genuine the alleged signatures of the appellant on the account books of the plaintiffs and should have reopened the account between the parties.

[3] The document (Ex. 3) is a letter dated 23-10-1936, addressed to Messrs. Thanmal Chunilal and signed by the defendant-appellant on behalf of the defendants' firm Ramrachpal Surajmal. It was signed and made over to the plaintiffs on the very day when the title deeds were deposited with them by way of security. It is as follows:

"We write to put on record that to secure the repayment of the money already due to you from us on account of the business transaction between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7, Sambhu Mullick Lane relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all monies including interest that may be found due and payable by us to you on account of the said transactions."

Then follows a list of the property referred to. It is contended that this document constitutes the bargain between the parties and, therefore, was compulsorily registrable under the provisions of S. 17, Registration Act.

[4] The law regarding documents passing between parties in connection with transactions of this kind has been considered in a large number of reported decisions and was laid down, as long ago as 1873, by Couch, C. J. in terms which have been repeatedly approved and followed, in 20 W. R. 150.[1]

"The rule with regard to writings is that oral proof

cannot be substituted for the written evidence of any contract which the parties have put in to writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within S. 17, Registration Act."

The document in that case was a promissory note whereby the mortgagor promised to repay "the sum of Rs. 1200, with interest at the rate of 24 per cent, per annum for value received in cash,"

and there was an endorsement :

"For the repayment of the loan of Rs. 1200/-, and the interest due thereon of the within note of hand, I hereby deposit with Baboo Sham Lall Khettry as a collateral security by way of equitable mortgage title-deeds of my property situate at No. 11 in Fuckeer Chand Mitter's street at Mirzapore in Calcutta."

Their Lordships were of the opinion that the promissory note was given either at the same time as the deposit of the title deeds was made or some hours after it in pursuance of an understanding between the parties. Nevertheless, on a consideration of the facts, they held that it was not a contract for the mortgage but was nothing more than a statement by the mortgagor admitting that he had deposited the deeds on the advance of the money for which the promissory note was given.

[5] Our attention has been drawn to several cases in which the document in question was held to constitute the bargain between the parties and, consequently, to require registration. The test applied in 50 I. A. 77[2] was whether the document constituted the bargain between the parties or was merely the record of an already completed transaction. It was a memorandum signed and delivered to the plaintiff on the occasion of the deposit of the title deeds. In holding that it constituted the bargain, their Lordships stressed the following words appearing on it:

"We hand herewith title deeds, etc. . . . . This please *hold* as security, etc. . . . .Please also *hold* this as further security."

Clearly the document was the instrument by which the deposit was made. In A.I.R. 1939 P.C. 167,[3] the memorandum was a formal and elaborate document not only containing all the terms on which the moneys were advanced but expressly conferring a power of sale. It contained a parenthetical passage stating that the title deeds had been previously delivered with intent to create a security, but their Lordships thought that this did not alter the character of the memorandum itself, which if the parenthetical passage was disregarded, was an instrument effective to create an interest in the property in favour of the mortgagees. The reason was that the memorandum did not merely evidence an already completed transaction but was couched in an operative language. It was contractual in form and embodied an agreement that the title deeds in question were to be held as security for the advances made and it spoke of the moneys "hereby secured". In 24 C. W. N. 599,[4] the title deeds were already in the custody of the plaintiff having been deposited as security for a previous loan. At the time of taking a subsequent loan for Rs. 1500, the defendant gave the plaintiff a letter which ran as follows:

"Dear sir, for repayment of the sum of Rs. 1500/- with interest I have borrowed from you on a promissory note of date, I hereby put on record that the title deeds *re* my premises No. 1, Garpar Road, already deposited with you, *shall be held as collateral security.*"

The words placed in italics by me are clearly operative. The documents being already in the custody of the plaintiff formal redeposit of the documents was necessary in order to complete the transaction, and this formal redeposit was made by these words. In coming to their decision, their Lordships pointed out that the case was similar to that in 7 Beng. L. R. (O. C.) 55,[5] in which the deeds were sent from the defendant to the plaintiff's attorneys with a letter, which stated :

"I have the pleasure of handing to you the title deeds of a house No. 56, Lower Circular Road, as a collateral security for the Rs. 20,000, which falls due this day. Please accept them from my Manager."

It was also similar to A. I. R. 1937 Cal. 741,[6] in which the memorandum stated :

"As collateral security for the due repayment of the loan of Rs. 1,25,000 (one lac twenty-five thousand rupees) which you have this day lent and advanced to me on my Hundi of to-day's date. . . . I herewith deposit with you my principal title-deeds etc. . . . I hereby also undertake to deposit with you in Calcutta the other title-deeds etc. . . . I further place on record that interest will run on the amount of the said Hundi at the rate of Rs. 3, 000 (three thousand rupees) per month from and after the expiry of 90 days from the date until realisation."

[6] If we examine Ex. 3 in the light of the above decisions, we will find in it no provision which can be described as an operative provision. On the face of it, it merely records a transaction which has taken place between the parties and creates evidence of the circumstances in which the title deeds were deposited with the plaintiffs. The case seems to be on a par with 58 I. A. 68,[7] where, before the plaintiff's arrival on the scene, the Manager had already handed over to the plaintiff's son two documents which he had written out and signed — namely : (1) A promissory note for Rs. 60,000 payable on demand with interest at 1 per cent. per mensem and (2) a memorandum which consisted of a list of the title deeds, with the following introductory words:

"Written to E. N. A. Samoo Battar by Krishnaswami Ayyar, of S. V. Ramasami Ayyar and Brothers. As

agreed upon in person I have delivered to you the undermentioned documents as security".

Upon the arrival of the plaintiff, the deeds were examined to see whether they were in order, and, on being found to be so, the deeds, the promissory note and the memorandum were put away in the plaintiff's safe, and the loan was advanced by the plaintiff on the security thus created. The test laid down by their Lordships was that, to bring a memorandum relating to deposit of title deeds within S. 17, Registration Act, it must, on its face, embody the terms of the transaction and be signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties, but it is not necessary that it should embody all the particulars of the transaction of which the deposit forms a part. Our attention has been drawn to the evidence relating to the signing and making over of the memorandum (EX. 3) in an attempt to establish that it was signed and made over to the plaintiffs' firm before the deeds of title were made over. Plaintiffs' witness Hira Lal stated :

"After the *lekha parhi* Rachhpal Maharaj gave certain documents to Parmanand Babu. The papers were given to him for the purpose of keeping them in respect of the dues. At about 4 p. m. Rachhpal Maharaj came to Parmanand Babu and delivered to him this paper (Ex. 3) . . . . Parmanand Babu then asked him to sign the paper. He put his signature then. . . . There was no other *lekha parhi* than this paper Ex. 3 at that time."

This evidence is not at all clear on the point as to whether the documents were made over before or after the signing and making over of exhibit 3. *Lekha parhi*, to which the witness referred in his earlier statement, may be the drafting and typing of the memorandum. It may not include the signing, which might have come somewhat later. The only definite statement, which the witness makes on the point, occurs in his cross-examination, where he states that the delivery of the documents and the signature on exhibit 3 were made at the same time. The point, however, is not of much importance. The question really is what was the intention of the parties in executing that document, was the document intended to be an operative document and to constitue any part of the bargain between the parties? As was held in 58 I. A. 68,[7] the mere fact that it was signed and made over before the transaction between the parties was completed would not make it an operative document. On these considerations, I am satisfied that exhibit 3 is merely a memorandum regarding the fact of the deposit of the documents, and that it does not exclude oral evidence of the mortgage agreement. This point must, therefore, be decided against the appellant.

[7] On the point of interest, it is contended that the claim in the plaint is based on a stipulated rate of interest, and that the evidence does not make out such a rate of interest. It is urged that the Subordinate Judge wrongly allowed interest at the commercial rate prevailing at the time of the transaction. The allegation in the plaint is that it was stipulated between the parties that interest should be paid "at the rate of 9 annas per hundred rupees per month according to *mahajani* system." In evidence, Parmanand Daruka (P. W. 2) deposed : "The commercial rate of interest is 9 annas p. c. per mensem compoundable every year." This statement was clearly made in direct reference to the pleading in the plaint that interest was payable according to *mahajani* system, and, it is in reference to this, that the Court found that the commercial rate of interest was as stated. It is, therefore, not correct to say that the interest granted by the Court is not in accordance with the pleading in the plaint. As regards the correctness of this rate of interest, the Subordinate Judge has rightly accepted the statement of the witness because it was not challenged by any cross-examination on the point, and no evidence to the contrary has been given by the defence. The body of the plaint is somewhat vague as to whether the interest chargeable is simple interest or compound interest, but the point is made clear by a reference to the calculation of interest on which the claim is based, which calculation, as is stated in the last sentence of para. 4 of the plaint, is made at the stipulated rate of interest. Through some strange mistake, the Subordinate Judge in his judgment has described the interest chargeable as nine per cent. per annum instead of at nine annas per cent. per month, which is equivalent to $6\frac{3}{4}$ per cent. per annum. This has not affected the correctness of the decree, however, as the amount decreed has been calculated at the correct rate, namely $6\frac{3}{4}$ per cent. per annum, compoundable with annual rests. On the above grounds, this point must also be decided against the appellant.

[8] This brings us to the third point, namely, the correctness of the amount claimed as due. In order to prove this, the plaintiffs have filed a complete set of account-papers extending over a period of about ten years. Supported by the oral evidence of Parmanand Daruka (P. W. 2) and witnesses Mangi Lal Sharaf and Hira Lal, both employees of the plaintiffs' firm, who were examined on commission, these papers show that, on three occasions, the accounts between the parties were made up, and, on each occasion, Rachpal Maharaj signed in the books of the plaintiffs' firm in acknowledgment of the correctness of the result arrived at. His signatures in

token of acknowledgment are Ex. 2 series. The last such acknowledgment, dated Phagun Badi 10, Sambat 1997 says "After comparison of account Rs. 10,891-2-3 (rupees ten thousand eight hundred and ninety-one, annas two and pies three only) remained due and payable up to Katik Badi 15, Sambat 1997." It is urged that the Subordinate Judge should not have accepted the signatures of Rachpal to have been proved by this evidence but should have insisted upon the examination of a handwriting expert for this purpose. This was not a case, however, where the plaintiffs relied only upon the acknowledgment of the appellant. In order to prove their dues, the plaintiffs produced direct evidence to establish what amount was due to them. The finding at which the Subordinate Judge arrived is not based merely on the acknowledment as such. What he says is that the accounts put in by the plaintiffs together with the evidence of the three plaintiffs' witnesses establish the correctness of the plaintiffs' claim. It is in the light of this evidence that he considered the genuineness of the defendants' signatures and refused to accept his denial of these signatures. Besides that, the defendant did not impress him as a truthful witness. He rightly commented on the fact that, although the defendant maintains accounts and admits that his accounts for the last 12 years are in existence, he did not produce the accounts in Court. Here, again, it is urged that the Subordinate Jugde was wrong in drawing an inference against the defendant from the non-production of these accounts, and A.I.R. 1945 Pat. 453[8] is cited as an authority that such an adverse inference should only be drawn if the party, being called on to produce papers, fails to do so. That case is not an authority for such a broad proposition. The contention there was that the papers which had not been produced were irrelevant for the purposes of the plaintiff and, therefore, it was not necessary for the plaintiff to produce them and an adverse inference ought to be drawn only if the failure had occurred after being called on to produce them. In the present case, where the defendants were not only denying the correctness of the claim of the plaintiffs but went so far as to assert that, on the contrary, it was the plaintiffs who owed them money, the account books of the defendant firm were very relevant documents, and the Court was right in attaching great significance to their failure to put these documents into evidence. I see no reason whatever to doubt the correctness of the accounts as shown in the papers of the plaintiffs and would decide this point also against the appellant.

[9] This disposes of the contentions of the appellants. Mr. S. N. Banerji, appearing for minor respondents 7 to 13, raises a new point on their behalf, namely that, in the absence of proof of legal necessity, they cannot be made liable under the decree. He refers to para. 5 of the written statement filed on behalf of these minor respondents, in which this plea is set out. In spite of the plea having been taken in the written statement, however, no issue was framed on the point, and, although the minors were represented at the hearing of the suit, no reference was made to it. It must be taken, therefore, that the point was given up, and, as it involves a question of fact, they cannot be allowed to raise it at the appellate stage. On the above grounds, I would dismiss this appeal with costs to the plaintiffs-respondents.

**Shearer J.**—I agree.

R.G.D. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 255** *[C. N. 93.]*

AGARWALA AG. C. J. AND DAS J.

*Ramautar Dubey—Petitioner* v. *Rambrich Singh—Opposite Party.*

Criminal Revn. No. 602 of 1946, Decided on 30-1-1947, from decision of Addl. Dist. Magistrate, Shahabad, D/- 26-4-1946.

Bihar and Orissa Local Self-Government Act (3 [III] of 1885), S. 141—Breach of bye-law framed under Act—Prosecution instituted by Chairman of Local Board — No evidence to show that he was authorised to do so — Prosecution is defective.

For a breach of certain bye-law framed by the District Board of Shahabad, prosecution was instituted by the Chairman of the Local Board of Buxar. There was no evidence that the Chairman of the Local Board of Buxar had been authorised by the District Board to institute this prosecution :

*Held* that even assuming that it was permissible for a Local Board to prosecute in respect of a breach of a bye-law framed by a District Board, there was no evidence that the Local Board of Buxar authorised its Chairman to institute this prosecution. Hence the prosecution was defective ab initio. [Para 2]

*A. B. N. Sinha*—for Petitioner.

*Sarjoo Prasad*—for Opposite party.

**Agarwala Ag. C. J.** — The petitioner has been convicted for a breach of bye-law (1) of the bye-laws framed by the District Board of Shahabad under the powers conferred upon it by S. 139, Bihar and Orissa Local Self-Government Act, 1885. The bye-law provides *inter alia* that whoever encroaches on any road by the construction of any building or structure thereon, except by the permission of the Chairman of the District Board, shall be liable to pay a fine not exceeding Rs. 50, and to a further fine not exceeding Rs. 2 for every day the offence is continued. The petitioner has been sentenced to pay a fine of Rs. 20, or to undergo simple imprisonment for two weeks in default, and also to pay a fine of a rupee a day if the obstruction be not removed within three weeks from the date of the conviction.

[2] The conviction and sentences are challenged by the petitioner on the ground that the prosecution was improperly instituted, that is to say, that it was not instituted by a person authorised to institute it. Section 139 of the Local Self-Government Act empowers every District Board or Local Board to make bye-laws for carrying out all or any of the purposes of the Act, and S. 140, empowers the Board making bye-laws to provide that a breach of the same shall be punished with fine which may extend to fifty rupees; and in the case of a continuing breach, with a further fine which may extend to five rupees for every day during which the breach is continued after the offender has been convicted of such breach. Section 141, however, requires prosecutions under the Act for breach of the bye-laws to be instituted by any Board, or by any person authorised by the Board in this behalf. Two questions, therefore, arise on the construction of this section, namely, (1) whether it is only the Board making the bye-laws, the breach of which is complained of, that is authorised to institute a prosecution for the breach, or whether a Board may institute a prosecution for the breach of bye-laws framed by some other Board, that is to say, whether a Local Board may institute a prosecution for a breach of the bye-laws framed by the District Board, or by some Local Board other than itself, or whether it is only with respect to the breach of its own bye-laws that a Board may institute a prosecution; and (2) whether, in the case of prosecution by a Board, the power to institute the prosecution may be exercised by the Chairman of the Board in the absence of power conferred on him by the Board to do so. The prosecution in the present case was instituted on a form headed "Prosecution Form District Board. Shahabad." At the bottom, under the words "prosecution sanctioned," is the signature of "Rambrich Singh, Chairman of the Local Board of Buxar," and the complaint is said to be in respect of a breach of the first bye-law of the District Board of Shahabad, the material portions of which have been set out above. If this be regarded as a prosecution by the District Board, there is no evidence on the record that the Chairman of the Local Board of Buxar has been authorised by the District Board to institute this prosecution. Even if it be permissible for a Local Board to prosecute in respect of a breach of a bye-law framed by a District Board, there is no evidence that the Local Board of Buxar authorised its Chairman to institute this prosecution, or that the complaint is by the Local Board itself. It does not purport to be signed by the Chairman for and on behalf of the Board, but merely by the Chairman of the Board as such. We have been shown no authority either by way of a statutory provision, or a rule framed under powers conferred by the statute, or derived from a resolution passed by the Board in the exercise of its powers, authorizing a Chairman to institute a prosecution on behalf of the Board. The proceedings in this case were defective ab initio, and must, therefore, fail.

[3] I, cannot, however, leave the matter there without remarking once more on the inadequacy of the preparation made by those in charge of prosecutions for placing before the Court the materials essential to enable the Court assume jurisdiction of the matter placed before it, or to exercise its powers properly. When the institution of a prosecution is confined to a particular person, or a body, or when a thing is directed to be done in a particular way, it is absolutely necessary for the prosecution to place on the record the materials from which the Court may see that the prosecution has been instituted by that person or body, and that it has been instituted in the manner required by the statute. When this is not done, it is a mere waste of public time and of the time of Courts, which are already pressed with an abundance of work, to investigate alleged breaches of the law and come to decisions which must inevitably be upset, when the authority under which the proceedings were instituted is challenged. In addition to this is the waste of time of citizens who are summoned to give evidence in such cases and the expenses entailed by them. Time and again, in the course of the last few years, this Court has endeavoured to impress upon the authorities the necessity of taking precautions to see that prosecutions are not instituted until all matters appertaining thereto have been considered and put in order and then to place the relevant matter on the record. In spite of the efforts of this Court in that regard nothing appears to have been done to put things right, and even in this Court, more often than not, when these matters are sought to be investigated, it is impossible to derive any but the very scantiest assistance in securing the proper materials.

[4] The conviction and sentences in the present case must be set aside because we have not been convinced that this is a prosecution instituted by a Board which had power to institute it or by any person authorized by that Board to do so. A copy of this judgment will be sent to the Legal Remembrancer.

**Das J.** — I agree.

D.S. *Conviction set aside.*

**A. I. R. (35) 1948 Patna 257** *[C. N. 94.]*

MANOHAR LALL AND MUKHARJI JJ.

*Malik Md. Ibrahim*—*Appellant* v. *Harakh Narayan Singh and others*—*Respondents.*

A. F. A. D. No. 1293 of 1945, Decided on 6-5-1947, from decision of 1st Addl. District Judge, Monghyr, D/- 29-6-1945.

**Hindu law—Alienation—Necessity — Mortgage by karta of joint family property to meet expenses of marriage of his daughter's daughter — Girl's father alive and in position to marry her — Mortgage is not for legal necessity.**

**A mortgage by the managing member of a joint Hindu undivided estate can only be justified for purposes of necessity and the doctrine cannot be extended for pious purposes. A mortgage of a joint family property excuted by the karta of the family for meeting the expenses of the marriage of his daughter's daughter whose father was alive and in a position to arrange for the marriage, does not constitute such a legal necessity as would bind the estate left by the karta. The descendants of the karta also are not therefore bound by the mortgage : 3 A. I. R. 1916 Pat. 178, *Foll.* ; 9 A. I. R. 1922 P. C. 261 ; 29 A. I. R. 1942 Mad. 106 and 21 A. I. R. 1934 Mad. 432, *Disting.*** [Paras 6, 7, 10]

*Cases referred* : —

1. ('16) 3 P. L. W. 377 : 3 A. I. R. 1916 Pat. 178 : 1 Pat. L. J. 81 : 34 I. C. 277, Mt. Narainbati Kunwari v. Ramdhari Singh.
2. ('42) 29 A. I. R. 1942 Mad. 106 : I. L. R. (1942) Mad. 42 : 198 I. C. 169, Srinivasa Rao v. Annadhanam Sesbacharlu.
3. ('34) 57 Mad. 772 : 21 A. I. R. 1934 Mad. 432 : 155 I.C. 79, Venkatasubba Rao v. Lakkaraju Ananda Rao.
4. ('22) 49 I. A. 383 : 9 A. I. R. 1922 P. C. 261 : 44 All. 503 : 69 I. C. 36 (P. C.), Sardar Singh v. Kunj Bihari Lal.
5. ('24) 51 I. A. 129 : 11 A. I. R. 1924 P. C. 50 : 46 All. 95 : 77 I. C. 689 (P. C.), Brij Narain Rai v. Mangla Prasad.
6. ('47) 34 A. I. R. 1947 Mad. 65 : I. L. R. (1947) Mad. 379 : 231 I. C. 331, Thimma Reddi v. Chinna Ranga Reddi.

*L. K. Jha and M. Rahman* — for Appellant.

*B. N. Rai, T. P. Sinha and Ugrah Singh* — for Respondents.

**Mukharji J.**—This second appeal is by the plaintiff whose suit for enforcing a mortgage bond was decreed in part by the learned Subordinate Judge, but was dismissed on appeal by the learned Additional District Judge.

[2] One Bisu Singh had four sons, Rajkumar, Rupan, Ramdhari and Shivanandan. Rupan died leaving a widow. Shivanandan's only son, Ram Manorath, was dead when the bond in suit, Ex. 1, was executed. Rajkumar had two sons, Tribeni and Ramratan. Tribeni died during the pendency of the appeal before the Additional District Judge. Ramdhari, who is dead, has left sons and grandsons. Exhibit 1, the mortgage bond, was excuted by Ramratan and Ramdhari. In the bond it is recited that the money Rs. 1500, was required for the marriage of Ramdhari's grand-daughter and for payment of petty debts to creditors. According to the plaintiff there were two repayments, one of Rs. 500 and the other of Rs. 751. After taking these repayments into account and remitting Rs. 825 odd, claim was laid at Rs. 2173 odd, the rate of interest mentioned in the bond being 1 p. c. p. m. The learned trial Court decreed the suit for Rs. 1749 allowing six months as the period of grace and adding that if the decree is not satisfied within this period, the plaintiff will be at liberty to realise the decretal amount with future interest at 6 p. c. p. a. by the sale of the mortgaged property.

[3] There was an appeal against the decision of the learned Subordinate Judge, and this was heard by the learned 1st Additional District Judge. The appellate Court held that there was no legal necessity for the loan. The learned Additional District Judge pointed out that there are discrepancies between the recitals in the bond and the evidence in Court. The bond states, as already mentioned above, that the loan was required for meeting marriage expenses and also for payment of petty debts. In evidence the plaintiff stated that the loan was necessary for marriage and to meet khalihan and bihan expenses. The evidence is silent as to what portion of the loan was required for meeting the marriage expenses. The plaintiff further stated in his evidence that some money was also required to meet the education expenses of Punit Narain Singh, one of the defendants.

[4] The defendants took a number of pleas, and among them one was that the family was a joint Hindu family with Ramdhari Singh at its head. Another plea was that the plaintiff was a farzidar for the defendants and that there was no passing of consideration under the bond. These pleas were negatived by both the Courts below.

[5] In this second appeal, it has been argued on behalf of the plaintiff-appellant that the question of legal necessity really does not arise in this case. The learned advocate for the appellant contends that the marriage of Ramdhari Singh's daughter's daughter was a pious act, and that as such it binds at least Ramdhari and his descendants. There does not appear to be any ruling of this Court exactly on this point. In 3 P. L. W. 377,[1] it was held that under the Hindu Law the marriage of a daughter's daughter is not a legal necessity. I have just said that the learned advocate for the appellant does not rest his case on legal necessity. He has referred to Colebrook's Translation of the Law of Inheritance according to the Mitakshara. In R. 28 of Chap. 1, S. 1 of this treatise there appears the following :

"As exception to it follows : — 'That even a single individual may conclude a donation, mortgage, or a

sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purpose'."

In order to understand R. 28, one should go back to the immediately preceding rule, according to which immovable properties belonging to the joint family cannot be alienated except with the consent of all the members. Mr. Jha who has argued the appeal for the appellant has laid great stress on the words "pious purposes," appearing in R. 28 just mentioned. According to him the marriage of Ramdhari's daughter's daughter was certainly a pious act so far as Ramdhari and his direct descendants were concerned. In this connection reliance has been placed upon a ruling reported in A. I. R. 1942 Mad. 106.[2] It is the ruling of a single Judge. The facts of the case are altogether different from those of the present case. His Lordship held that under the Hindu Law a daughter inheriting property from her mother can alienate the property for the reasonable expenses for the marriage for her daughter's daughter as the purpose of such a marriage is a pious and meritorious act under the Hindu Law which would conduce to the spiritual benefit of the deceased parents of the alienor. There are two distinguishing features of this case which should not escapse notice. The alienor is a daughter who inherited from her mother. The father of the girl given in marriage was poor and her mother was dead. For all practical purposes the girl was thus an orphan. His Lordship stressed in this case that the expenses should be reasonable. In the present case there is no evidence as to whether the expenses incurred in connection with the marriage of Ramdhari's daughter's daughter were, in the circumstances of the case, reasonable. There is also no evidence that the father of the girl was indigent. In the course of the erudite judgment delivered by his Lordship reference was made to Samskara Ratnamala of Bhatta Gopinatha. The learned author speaks of benefits accruing from the shastric gifting of destitute kanyas (daughters) in marriage. There is no evidence in the present case, as already mentioned, that the girl in question is a destitute one who could not be married except with the help of Ramdhari Singh. Mr. Jha also relied on the case in 57 Mad. 772.[3] There it was held that a sale by a Hindu widow of a reasonable portion of her husband's estate for debts contracted for the thread and marriage ceremonies of one of her daughter's sons was binding on the reversioner. One important feature of this case is that it lays down that such a sale is good even if the daughter's sons are not so indigent as to be dependent upon their grandmother. In considering this case one has to remember that alienation was by a Hindu widow and not by the karta of a joint family. A Hindu widow who has no son succeeds to the entire estate of her husband and she takes possession of it as an absolute owner. No doubt, her power of disposition is a qualified one and is analogous to the power of disposition of a male coparcener in a joint Mitakshara family, but she can alienate property in her possession for the spiritual benefit of her husband. A widow can excavate and consecrate a tank believing that this will conduce to the spiritual welfare of her husband and for this purpose she may alienate a portion of the property to which she has succeeded on the death of her husband, but it cannot be said that the karta of a joint Hindu family can validly make such alienation. In the case of the widow whatever is conducive to the spiritual well-being of the husband is a good ground for alienation. In the case of a joint Hindu family there is no spiritual welfare of any particular individual to be considered. The karta is in charge of the joint family properties on behalf of all the members, and he must manage the properties as a careful and prudent man.

[6] Reverting to the quotation from Colebrooke's Translation of the Mitakshara, I may observe that alienation by a single member for pious purposes is to be an exception. No doubt, exception proves the rule, but in order to make out a good case for such exception special reasons have to be given. If any alienation of or charge on the joint family property is to be made for the marriage of the karta's daughter's daughter who belongs to an altogether different family it must be shown that special considerations exist which would make such alienation or charge binding on the entire family. It would have been a good ground for the execution of the mortgage bond in question if there was evidence to show that the girl was so indigent that without the help of her maternal grandfather the marriage could not be performed.

[7] In my opinion the contention of the learned Advocate for the appellant that the mortgage bond is binding at least on the sons and grandsons of Ramdhari cannot be accepted. If Ramdhari had been alive, the mortgage would have been binding on him and him alone. On his death his sons and grandsons have taken the entire joint family property by survivorship. In my opinion the mortgage bond is not binding on them. So far as Ramratan, the other executant of the bond, is concerned, there was neither legal necessity nor any pious purpose.

[8] Tribeni, a brother of Ramratan, one of the executants of the mortgage bond, died during the pendency of the appeal before the learned

Additional District Judge. His heirs were not substituted as appellant 1 before the first appellate Court filed a petition to the effect that the heirs of Tribeni were already on the record. One of the grounds taken in the memorandum of the second appeal and urged at the time of hearing is that as Tribeni's heirs were not brought on the record, the whole appeal has abated. At p. 42 of the paper-book the learned first appellate Court has stated the four pleas which were pressed before him. The first was that the family was a joint Hindu family with Ramdhari as its karta. The second point pressed before the learned Additional Judge was that the mortgage bond was a farzi one. The third point so pressed was that there was no legal necessity. The fourth and the last point urged before the first appellate Court was that in view of the provisions of the Bihar Money-lenders Act the plaintiff was not entitled to get even a modified decree. These are all the points that were urged. There was no contention that the whole appeal abated because of non-substitution of the heirs of Tribeni Singh. Such a point cannot be taken in second appeal.

[9] In the result I would dismiss the appeal, but in the special circumstances of the case, without any costs.

[10] **Manohar Lall J.**—I agree and wish to make a few observations only with regard to the strenuous argument of Mr. L. K. Jha that the loan taken to meet the marriage expenses of Ramdhari Singh's daughter's daughter on the security of the mortgage of the joint family property binds the estate. The decision of this Court in 1 Pat L. J. 81[1] is expressly in point and is against the contention of Mr. Jha. In that case it was held that expenses for the marriage of a daughter's daughter whose father was alive and in a position to arrange for the marriage did not constitute such a legal necessity as would bind the estate left by the maternal grandfather. This decision is the decision of a Division Bench of this Court and binds us. Mr. Jha, however, argues that the decision is no longer binding upon us after the decision of their Lordships in 49 I. A. 383[4] In that case it was held that the gift by a Hindu widow in possession of the estate of her deceased husband of one seventy-fifth of the whole estate for the observance of bhog to a deity and for the maintenance of the priests at the temple and being expressly made for the salvation of her husband and his family members was for the spiritual benefit of the deceased husband and therefore bound the estate. It is argued that if the widow could alienate the property for the spiritual benefit of the husband, why could not the male member himself make a similar alienation for the same or similar purpose. It is suggested that the loan taken to meet the marriage expenses of the daughter's daughter was a pious act, the performance of which would confer spiritual benefit on the loantaker. Attention was also drawn to the verse in Mitakshara that a single individual of a joint Hindu family may conclude a donation, mortgage, or sale, of immovable property during a season of distress, for the sake of the family and specially for pious purposes (dharmarthe). I do not agree with this contention because that would be extending the limits of the doctrine of legal necessity laid down so clearly and affirmatively by their Lordships of the Judicial Committee in the celebrated case in 51 I. A. 129.[5] That decision, it will be observed, was given after the decision relied on by Mr. Jha before us in 49 I. A. 383.[4] A mortgage by the managing member of a joint Hindu undivided estate can only be justified for purposes of necessity and the doctrine cannot be extended for pious purposes.

[11] The matter would have been entirely different if it had been found that the father of the grand-daughter was in indigent circumstances and therefore the loan taken for the marriage expense of that grand-daughter should be treated as a legal necessity as pointed out in 1 Pat. L. J. 81.[1]

[12] Mr. Jha referred us to the case in A. I. R. 1942 Mad. 106,[2] a decision of a single Judge of the Madras High Court. But in that case as stated by the learned Judge at page 109 the question was whether the marriage of a daughter's grand-daughter could be said to be a pious and meritorious act which would conduce to the spiritual benefit of the deceased parents of defendant 1. The learned Judge after examining the texts came to a clear finding that in the case before him the mother of the girl was dead and the father was poor and was not possessed of any means to perform the marriage and that the girl and her parents were living with defendant 1 and she was being brought up by her. The decision, therefore, can be supported on these findings. The cases referred to by the learned Judge at page 109 of the Allahabad and the Madras High Court also appear to be cases in which the alienation was upheld on the ground that the husband of the daughter and the father of the girl were indigent. The observation of the learned Judge that the gift of a destitute virgin in marriage is a pious and meritorious act from religious point of view does not advance the argument of Mr. Jha because here it has not been found that the girl in question was a destitute virgin. On the other hand, Mr. B. N. Rai has relied on the case in A. I. R. 1947

Mad. 65[6] where it has been held that although the first marriage of a Hindu is a sacrament, but the second marriage is not and although it may be desirable in the circumstances in which he finds himself for a widower to marry again, but as neither his personal law nor his religion requires him to contract a second marriage, there is no justification for saddling the expenses of the second marriage on the family estate.

[13] It is unnecessary to pursue the matter further because I am satisfied that the decision in 1 P. L. J. 81[1] should be followed by us and that the decision in 49 I. A. 383,[4] has not shaken the correctness of that decision.

[14] I agree that the appeal should be dismissed without costs.

S.C. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 260 *[C. N. 95.]*

SINHA AND BENNETT JJ.

*Manoo Rai and others—Appellants* v. *Keshwar Rai and others—Respondents.*

Second Appeal No. 371 of 1946, Decided on 14-3-1947.

**Limitation Act (1908), S. 12—Time requisite for obtaining copy of judgment and decree—Time between application for copy and signing of decree cannot be excluded twice.**

**By reading Art. 156, Limitation Act with O. 22, R. 7, Civil P. C., the time between the pronouncement of the judgment and the signing of the decree has to be excluded from computing the period of limitation under Art. 156 for filing an appeal. That is to say for all practical purposes the period of limitation has to be calculated from the date the decree is signed. Time requisite for obtaining a copy includes the time during which the decree had remained unsigned. But this time cannot be excluded twice.** [Para 5]

Judgment was pronounced on 1st September 1945. The decree was signed on 30th November 1945. An application for copy of the judgment and decree both was made on 26th September 1945. The copies were ready for delivery on 6th December 1945 and were delivered to the applicant on the following day. The appeal was filed on 14th March 1946:

*Held*, that the time between 26th September 1945 and 6th December 1945 could not be excluded twice over and that the appeal was out of time the limitation having expired on 6th March 1946: 26 A. I. R. 1939 Nag. 150, *Commented upon*; 41 M. L. J. 273; 12 I. C. 677 (Cal.) and 23 A.I.R. 1936 Pat. 45 (FB), *Rel. on*; *Case law referred.* [Para 7]

Per *Bennett J.*—The period between the pronouncement of judgment and the signing of the decree is properly and necessarily excluded both as part of the time required for obtaining a copy of the decree and also as part of the time required for obtaining a copy of the judgment. For practical purposes, therefore time always begins to run from the date that the decree is signed. Once the time has begun to run it continues to run unless it is interrupted by an application for a copy of the decree or by an application for a copy of the judgment. Once the time is interrupted by one or other or both of these applications it merely stands still and when it is standing still by reason of one such application, it continues to stand still and does not start to run backwards merely because another application is made. When the applications and consequent interruptions overlap, time does not begin to run again until both of the interruptions have expired. Section 12 excludes actual periods of time which were in fact occupied by obtaining a copy of the decree and a copy of the judgment following an application therefor made in each case before the expiration of 90 uninterrupted days from the date of signature of the decree. It may well be that by making his applications consecutively within the period a party will obtain a longer delay within which to file his appeal than he would have obtained by making his applications concurrently or so that they overlap, but that is no reason to allow a double interruption to cause time to run backwards, because the section is concerned with periods of time actually and not merely theoretically excluded. [Para 8]

**Annotation. ('42-Com.) Lim. Act, S. 12, Notes 10 & 25.**

*Cases referred:*—

1. ('39) 26 A. I. R. 1939 Nag. 150 : I. L. R. (1939) Nag. 185 : 182 I. C. 662, Bal Krishna Rajaram v. Baijnath Girdharilal.
2. ('86) 13 Cal. 104 (F. B.), Bani Madhub Mitter v. Matungini Dassi.
3. ('16) 1 Pat. L. J. 573 : 3 A. I. R. 1916 Pat. 267 : 35 I. C. 868 (F. B.), Ram Asray Singh v. Sheo Nandan Singh.
4. ('21) 6 Pat, L. J. 350 : 8 A. I. R. 1921 Pat. 175 : 62 I. C. 649 (F. B.), Jotindranath Sarkar v. Lodna Colliery Co., Ltd.
5. ('36) 15 Pat. 284 : 23 A. I. R. 1936 Pat. 45 : 160 I. C. 447 (F. B.), Gabriel Christian v. Chandra Mohan.
6. ('28) 55 I. A. 161 : 15 A. I. R. 1928 P. C. 103 : 6 Rang. 302 : 109 I. C. 1 (P. C.), Jijibhoy N. Surty v. T. S. Chettiyar Firm.
7. ('21) 41 M. L. J. 273 : 66 I. C. 23, Vellaiyammal Bibi v. Koolayanna.
8. ('98) 8 M. L. J. 148, Raman Chetti v. Kadirvelu.
9. ('10) 33 Mad. 256 : 4 I. C. 301, Silamban Chetty v. Ramanadhan Chetty.
10. ('10) 12 I.C. 677 (Cal.), Sundar Koer v. Raghunath Sahai.
11. ('24) 11 A. I. R. 1924 Lah. 599 : 75 I. C. 1055, Ata Mahomed v. Pir Khan.

*K. K. Sinha and U. C. Sharma*—for Appellants.

**Sinha J.**—The question for our decision is whether the appeal was presented in time on 14th March 1946. The matter was first placed before the learned Registrar on 27th March last. He came to the conclusion that the appeal was time-barred on the date it was presented to the Court. As the learned Advocate for the appellants was not prepared to make an application for condonation of the delay under S. 5, Limitation Act, the learned Registrar directed that the matter be laid before the Bench. Ultimately, the case came up before me sitting singly. Being of the opinion that the question raised involved important considerations, and the decision, whatever it might be, would affect the practice of the Court one way or the other, I directed that the matter be referred to a Division Bench. It was placed before a Bench, consisting of Manohar Lall and Ray JJ., on 24th July 1946, and the Bench directed notice to issue "to the respondents to show cause why the delay, if any in filing the appeal should not be condoned."

Ultimately, the matter has been placed before us, and the only question raised before us is whether the appeal is in time on 14th March 1946, when the memorandum of appeal was presented before the learned Registrar. I do not find any application under S. 5, Limitation Act containing any statement of facts which would entitle the appellants to get the delay condoned, if this Court took the view that the appeal was time-barred when presented.

[2] It appears that the appellate judgment was pronounced on 1st September 1945. The decree was not signed by the presiding officer of the Court until 30th November 1945. It appears that an application for copy of the judgment and decree both was made on 26th September 1945, and the copies were ready for delivery on 6th December 1945, and were actually delivered to the applicant on the following day. It appears further that court-fee stamps for the memorandum of appeal and for the Vakalatnama were purchased on 14th March 1946, on which day the memorandum of appeal was presented to the Stamp Reporter who noted on the back of the memorandum that limitation expired on 6th March 1946, as per calculation on the back of the vakalatnama. The calculation aforesaid would show that the Stamp Reporter gave ninety days to the appellants from the date of the judgment, expiring on 30th November and added to that period ninety-six days for time requisite for obtaining copies, that is to say 31 days in December, 31 days in January, 28 days in February and 6 days in March. But it was contended before us by the learned counsel for the appellants that; the appellants having applied on 26th September 1945, for a copy each of the judgment and of the decree, which was delivered to them on 7th December 1945, they should be entitled to add not only the 96 days calculated from the 1st December 1945, as done by the learned Stamp Reporter, but also the days between 26th September 1945 and 1st December 1945. If this contention is well-founded in law, then it must be held that the appeal is in time. But this contention involves the proposition that the same period, namely, between 26th September 1945 and 1st December 1945, has to be added twice over as time requisite for obtaining the copies within the meaning of S. 12, Limitation Act.

[3] The question, therefore, is whether the litigant is entitled to credit for that period twice over in view of the provisions of S. 12, Limitation Act. It has been contended on behalf of the appellants that under S. 12(2) of the Act the time requisite for obtaining a copy of the decree appealed from has to be excluded, and that under sub-s. (3) of that section the time requisite for obtaining a copy of the judgment has also to be similarly excluded. If the contention is well founded, in this case the appellant would be entitled to exclude the same period twice over in calculating the time for filing the appeal. Reliance has been placed upon a decision of the Nagpur High Court in A. I. R. 1939 Nag. 150[1] in which, on a difference of opinion between the Chief Justice and another Judge constituting the Division Bench, Niyogi J. to whom the case was referred, agreed with the Chief Justice that, if an application for copy of the judgment to be appealed from is made on the day the judgment was pronounced, that day has to be excluded twice over in computing the period of limitation for filing the appeal. In that case the learned Chief Justice observed that Limitation Act should be construed so as to save rather than bar a proceeding. Niyogi J. in the course of his judgment made the following observations:

> "It may be that in an exceptional case, such as the present, one day happens to be excluded twice. However startling, fantastic or absurd it may appear to be, the Courts cannot refuse to give effect to the plain meaning of the words used by the Legislature, if it does not conflict with reason and justice. As I have indicated above, there is nothing fundamentally unjust or unreasonable in excluding the same day twice."

[4] The case was treated as an exceptional one in which the question of excluding one single day twice over was involved. But that argument once accepted may lead to absurdities and to results which, in my opinion, are not contemplated by S. 12, Limitation Act, as will presently appear. It has been contended on behalf of the appellants that the period to be excluded as contemplated in the different sub-sections of S. 12 is cumulative, even though some of those days may be the same days: in other words, it has been contended that the period requisite for obtaining a copy of the judgment and the period requisite for obtaining a copy of the decree appealed from should be separately calculated, and then added to the ninety days, the prescribed period for filing an appeal to this Court.

[5] More than 50 years ago, a Full Bench of the Calcutta High Court laid it down in 13 Cal. 104[2] that the period of limitation for filing an appeal should be calculated from the date on which the decree was actually signed, though under rule 7 of O. 20, Civil P. C., the decree shall bear the date on which the judgment was pronounced. That decision was not followed by the other High Courts in India. But a Full Bench of this Court in the very first year of its existence decided in 1 Pat. L. J. 573[3] to follow the practice prevailing in the Calcutta High Court. It was laid down in that case that under S. 12, Limitation Act an appellant is entitled to deduct the

time between the delivery of judgment and the signing of the decree in computing the period of limitation prescribed for an appeal which in effect meant that the period of limitation will be calculated from the date when the decree was actually signed by the presiding officer of the Court, and not the day on which the judgment was pronounced. This practice continued until a larger Bench of this Court decided in 6 Pat. L. J. 350[4] that the ruling in 1 Pat. L. J. 573[3] did not correctly express the law. Since after that decision, the established practice of the Calcutta High Court and of this Court as recognised by the two Full Bench decisions, referred to above, was departed from, and the rule laid down that the time requisite for obtaining a copy of the decree within the meaning of S. 12, Limitation Act, does not begin until the actual application for a copy has been made. But there was a swing back to the old practice when a Full Court (of seven Judges) decided in 15 Pat. 284[5] that the ruling laid down in the Full Bench in 6 Pat. L. J. 350[4] that the period between the date of judgment and the application for copy of the decree can in no case be excluded had been wrongly decided. In effect the Full Court restored the practice prevailing since after the decisions of the Full Bench of the Calcutta High Court referred to above, that the period between the delivery of the judgment and the signing of the decree shall be excluded, in computing the period of limitation for filing an appeal from that judgment. Under Art. 156, Limitation Act, the period of limitation for filing an appeal to the High Court except in certain specified cases is ninety days from "the date of the decree or order appealed from." As, under R. 7 of O. 20, Civil P. C., the decree bears the date on which the judgment was pronounced, the starting point of limitation would naturally be the date the judgment was pronounced, that was the view taken by some of the other High Courts. But this Court has ultimately come back to the old view prevailing in the Calcutta High Court that the time between the pronouncement of the judgment the signing of the decree has to be excluded, that is to say, for all practical purposes the period of limitation has to be calculated from the date the decree is signed. This result has been arrived at by application of S. 12, Limitation Act, read in the light of the observations of their Lordships of the Judicial Committee in 55 I. A. 161.[6] The same case has been relied upon in this case by the learned advocate for the appellants as supporting his contention that the same period may be given credit for twice over. That was not what was decided by their Lordships of the Judicial Committee in that case. The exact question which was before their Lordships was whether the time requisite for obtaining a copy of the decree should not be excluded even though by rule of the Court in which the matter arose the memorandum of appeal need not be accompanied by a copy of the decree. It is only by an extension of the rule laid down in S 12, Limitation Act, that we have arrived at the conclusion reached by the Full Court decision, referred to above, of this Court that the time requisite for obtaining a copy includes the time during which the decree had remained unsigned by the presiding Officer of the Court who pronounced the judgment. We are in this case asked to extend the rule laid down in the Limitation Act further and to hold that the same period may be deducted twice over. If this contention were correct, litigants may find it easy to double the period of ninety days which the Legislature has prescribed as the maximum time during which an appeal should be presented to this Court. It is not difficult to imagine a case where, on account of a controversy as regards the true meaning of the judgment between the parties, the decree is not signed until several months after the judgment has been pronounced and usually it takes several weeks for the presiding officer of the Court to find it feasible to sign the decree prepared by the office. The litigant may make his application for a copy of the judgment and the decree (to be signed thereafter) on the very day the judgment is pronounced. In that way the litigant may get as much as six months, or even more, for filing his appeal. Thus virtually by accepting the appellants' contention we may give a handle to the litigants to extend the period of limitation at their own sweet will and pleasure. Hence, in my opinion, unless the words of S. 12, Limitation Act, are so coercive as to lead us to accept the appellants' contention, we should be very loath to come to any such conclusion. In my opinion, litigants have been given the fullest benefit of S. 12, Limitation Act, by the Full Court decision of this Court, referred to above, and we should not be a party to a further extension of that rule by holding that the time spent in obtaining a copy of the judgment should be added to that extended period even if all this period over-lapped the period already conceded to the litigants. If the arguments on behalf of the appellants in this case were to be accepted, the logical conclusion would be that in every case the litigant is entitled to exclude the entire period between the judgment and the signing of the decree as also the period of time spent in obtaining a copy of the judgment even though the latter period may be included in the former. Such a conclusion, in my opinion, is not warranted by the plain words of the statute.

[6] In my opinion, there is no principle or precedent in support of such a contention. The only direct authority in support of the contention on behalf of the appellants is the decision of the Nagpur High Court, referred to above. But as against that single decision, can be cited a number of other decisions which, in my opinion, have taken the more correct view of the legal position. A Division Bench of the Madras High Court in 41 M. L. J. 273[7] has clearly affirmed the proposition that in computing the period of limitation for filing an appeal the time taken in obtaining a copy of the judgment and the time taken in obtaining a copy of the decree must both be excluded under S. 12, Limitation Act, except where these two periods overlap each other, and that where they do overlap the common days should be excluded only once. They relied upon two previous decisions of the same Court in 8 M. L. J. 148[8] and 33 Mad. 256.[9] A Division Bench of the Calcutta High Court, consisting of Mookerjee and Carnduff JJ., has come to the same conclusion in 12 I. C. 677.[10] The learned Judges in that case have ruled that, where the time occupied in obtaining a copy of a judgment is included in the period during which the decree was not in existence, both the periods should not be deducted. In that case their Lordships further considered the question of whether it was a fit case in which the Court could exercise its judicial discretion in favour of condoning the delay under S. 5, Limitation Act, and, after considering both English and Indian decisions, their Lordships held that in the circumstances of that case the delay should be condoned, inasmuch as the litigant had acted under erroneous advice given by his pleader—an advice which the Court thought, though erroneous, could have been given by an experienced practitioner. In the present case, there is no application for condoning the delay nor the reasons disclosed therefor. A single Judge of the Lahore High Court has taken the same view in A. I. R. 1924 Lah. 599.[11] The facts of that case were similar to those in A. I. R. 1933 Nag. 150.[1]

[7] In my opinion, the preponderance of authority is in favour of the view I have already indicated, namely, that the appellants are not entitled to deduct the period of time taken in obtaining a copy of the judgment appealed from in the circumstances of this case. It must, therefore, be held that the appeal is out of time.

[8] **Bennett J.** — In my opinion, it is only because of the existence of a false method of computation, expressed by way of an addition of days, of the period of limitation fixed by S. 12, Limitation Act, that any doubt can and has arisen as to the application of what appear to me to be the perfectly clear and straightforward provisions of that section. The question under that section is always whether 90 days have expired from the date at which time began to run exclusive of any period or periods excluded by the provisions of section. No question of adding days as such arises at all. It is quite immaterial whether we reckon that time begins to run at the date when judgment is delivered or at the date, when, which is necessarily a later date, the decree is signed because, although, to facilitate the business of litigants, the Courts may allow applications both for a copy of the decree and for a copy of the judgment to be put upon the file, no copy either of the decree or of the judgment can properly be demanded until the decree is signed. Were such a copy demanded before that date, the office would properly refuse on the ground that the decree had not yet been signed. The period in between the pronouncement of judgment and the signing of the decree is, therefore, in any event, properly and necessarily excluded both as part of the time required for obtaining a copy of the decree and also as part of the time required for obtaining a copy of the judgment. For practical purposes, therefore, time always begins to run from the date that the decree is signed. Once time has begun to run it continues to run unless it is interrupted by an application for a copy of the decree or by an application for a copy of the judgment. Once time is interrupted by one or other or both of these applications it merely stands still and when it is standing still by reason of one such application, it continues to stand still and does not start to run backwards merely because the other application is also made. When the applications and consequent interruptions overlap, time does not begin to run again until both of the interruptions have expired. Section 12, Limitation Act, excludes the actual periods of time which were in fact occupied by obtaining a copy of the decree and a copy of the judgment following an application therefor made in each case before the expiration of 90 uninterrupted days from the date of signature of the decree. It may well be that by making his applications consecutively within the period a party will obtain a longer delay within which to file his appeal than he would have obtained by making his applications concurrently or so that they overlap, but, that is no reason to allow a double interruption to cause time to run backwards, because the section is concerned with periods of time actually and not merely theoretically excluded.

[9] Applying these considerations to the facts of this case, time began to run on 30th November 1945, but was immediately interrupted by the applications for copies of decree and judg-

ment already allowed to be put upon the file, and began to run again when both the interruptions expired on 6th December 1946. The period of limitation expired 90 days thereafter on 6th March 1946. It follows that the appeal was out of time when it was filed on 14th March 1946.

R.G.D. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 264** *[C. N. 96.]*

MANOHAR LALL AND MUKHARJI JJ.

*Dulhin Talukraj Kuar and another—Appellants* v. *Babui Bacha Kuar—Respondent.*

A. F. O. D. No. 95 of 1944, Decided on 4-2-1947, from decision of Addl. Sub-Judge, Chapra, D/- 31-1-1944.

Hindu Law of Inheritance (Amendment) Act (1929), S. 1 (2) — Applicability of Act to succession to stridhan property held by female.

The rule of stridhan succession accordiug to the Mitakshara School of Hindu law has not been altered by the Hindu Law of Inheritance (Amendment) Act, 1929. The Act has no application to succession to stridhan property held by a female : 29 A. I. R. 1942 Nag. 57, *Foll.*; 30 A. I. R. 1943 P. C. 10 and 33 A I.R. 1946 Mad. 294, *Rel. on*; 21 A. I. R. 1934 Pat. 398; 29 A. I. R. 1942 Pat. 161; 24 A. I. R. 1937 Mad. 699 and 21 A. I. R. 1934 Pat. 324, *Disting.*; 24 A. I. R. 1937 Lah. 196, *Dissent.* [Paras 8 & 9]

*Cases referred* :—

1. ('42) 69 I. A. 145 : 30 A. I. R. 1943 P. C. 10 : I. L. R. (1943) Kar. P. C. 12 : 206 I. C. 396 (P. C.), Mt. Sahodra v. Ram Babu.
2. ('34) 13 Pat. 550 : 21 A. I. R. 1934 Pat. 398 : 152 I. C. 446, Kamla Prasad v. Murli Manohar.
3. ('42) 29 A. I. R. 1942 Pat. 161 : 197 I. C. 192, Naubat Singh v. Mt. Shambarat Kuar.
4. ('34) 21 A. I. R. 1934 Pat. 324 : 150 I. C. 1039, Chulhan Barai v. Mt. Akli Baraini.
5. ('37) 16 Pat. 215 : 24 A. I. R. 1937 Pat. 117 : 167 I. C. 17 (F. B.), Pokhan Dusadh v. Mt. Manoa.
6. ('37) 24 A. I. R. 1937 Lah. 196 : 172 I. C. 660, Mt. Charjo v. Dina Nath.
7. ('46) 1946-1 M. L. J. 196 : 33 A. I. R. 1946 Mad. 294 : I. L. R. (1947) Mad. 23 : 225 I. C. 496, Mahalakshmamma v. Suryanarayana Sastri.
8. ('42) I. L. R. (1942) Nag. 629 : 29 A. I. R. 1942 Nag. 57 : 199 I. C. 379, Shakuntalabai v. Court of Wards.
9. ('37) 24 A. I. R. 1937 Mad. 699 : I. I. R. (1937) Mad. 948 : 171 I. C. 7 (F. B.), Lakshmi Ammal v. Anantharama Ayyangar.

*B. N. Rai and Angad Ojha* — for Appellants.
*S. Mehdi Imam and Murtaza Fazl Ali* — for Respondent.

**Manohar Lall J.** — In this appeal by the plaintiffs an interesting question arises for decision, namely whether the rule of the stridhan succession according to the Mitakshara School has been altered by Hindu Law of Inheritance (Amendment) Act (Act 2 of 1929), hereinafter to be referred to as the Act.

[2] This is an appeal by the plaintiffs who are aggrieved by the decision of the first Additional Subordinate Judge of Chapra, dated 31st January 1944, by which he has dismissed their suit which was instituted for recovery of possession of the disputed property in these circumstances.

[3] Gosain Jag Mohan Datt Pandit, the common ancestor of the parties, had two sons, Gossain Gopal Dutt Pandit and Gossain Chatturbhuj Dutt Pandit. Gopal Dutt had four sons, two of these, Radha Kishun Dutt and Basudeo Dutt, died before the relevant date; the third son, Ramkishun Dutt, died in 1934 leaving two widows the two plaintiffs in the action. The fourth son, Chandra Shekhar Dutt, is also dead. The plaintiffs' case was that all these four sons and Gopal Dutt died separate from one another.

[4] Chatturbhuj Dutt was the father of Praduman Dutt Prasad, who was married to one Mt. Akho Kuer. He also had a daughter, Babui Bacha Kuer, who is the defendant in the action. After the death of his son Praduman Dutt Prasad, his father Chatturbhuj Dutt executed a will by which he gave twelve annas out of his properties to Mt. Akho Kuer in absolute right and the remaining four annas he gave to his daughter, Bacha Kuer, the defendant, similarly in absolute right. Praduman Dutt and Mt. Akho Kuer had three daughters, Suruj Kala Kuer, Chandra Kala Kuer and Bindhyachal Kuer—the latter two died issueless during the life time of Mt. Akho Kuer. On the death of Mt. Akho Kuer, the twelve annas share in the property of Chatturbhuj Dutt—which is the property in dispute—was inherited by her daughter, Suraj Kala Kuer. Suraj Kala Kuer admittedly died in 1929. The plaintiff's case was that she died in January 1929, but the defendant's case was that she died in March 1929. The learned Subordinate Judge on an examination of the evidence has come to the conclusion that Suraj Kala Kuer died on 12th March 1929 and not on 2nd January 1929, and this conclusion is based upon ample evidence and cannot be seriously challenged in appeal. Accordingly, it must be held that Suraj Kala Kuer died on 12th March 1929. On her death disputes arose as to the succession to the properties which were held by her as the stridhan heir of Mt. Akho Kuer. The plaintiffs' case was that their husband came into possession of the property and continued in possession till the date of his death in 1934. The defendant's case on the other hand was that she came into possession from the date of the death of Suraj Kala Kuer. The dispute between the husband of the plaintiffs and the defendant began in the land registration department. It is unnecessary to refer to the various stages at which the mutation Courts passed different orders. It is enough to state that the matter was ultimately referred to the civil Court under S. 55, Land Registration Act. The plaintiffs instituted the suit giving rise to this appeal on 11th August

1941 basing their cause of action on the date of dispossession of the plaintiffs' husband on 1st February 1933.

[5] As already stated, the defendant's case was that she was in possession from the date of death of Suraj Kala Kuer, that is from 1929. Her further case was that by the provisions of Act 2 of 1929, she being the sister of Praduman Dutt was entitled to succeed to her estate as the Act was in operation at the date of her death.

[6] The learned Subordinate Judge has come to the conclusion that after the enforcement of Act 2 of 1929 the plaintiffs can have no title as the defendant is the preferential heir. He has also come to the conclusion that the story of possession put forward by the plaintiffs was false and the suit was barred by limitation. Hence the appeal to this Court.

[7] It is argued by Mr. B. N. Rai on behalf of the appellants that Act 2 of 1929 has no application to the succession to stridhan property held by a female and draws attention to the preamble of the Act which says that the Act is passed to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate. On the other hand, Mr. Mehdi Imam contends that the provisions of this Act ought to be applied in the present case because on the death of Suraj Kala Kuer the property would devolve on the husband of Mt. Akho Kuer, namely Praduman Dutt Prasad, and, therefore, the property though undoubtedly it was a stridhan property in the hands of Mt. Akho Kuer must henceforward be treated as if it belonged to Praduman Dutt Prasad. He, therefore, suggests that the succession to the property will now be governed by the new Act of 1929.

[8] In my opinion, the argument of the appellants is sound and must prevail. The ambit of the new Act, II of 1929, was considered by their Lordships of the Judicial Committee in 69 I. A. 145.[1] Sir Madhavan Nair, who delivered the judgment of the Board, pointed out at page 152 that the object of the Act was to alter the order of succession of certain persons mentioned therein, and at page 153:

"The heading and preamble of the Act do not accurately summarise its provisions, but having regard to the language of S. 1 (2) of the Act which says that it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted . . . .' it would apply to the persons specified so as to constitute them heirs . . . "

The provisions of S. 1 (2) of the Act are so clear that it is difficult to appreciate a contrary argument. It states that the Act applies:

"to such persons in respect only of the property of males not held in coparcenary and not disposed of by will."

How can the Act apply to the property of females? The crucial question for decision in each case should be whether the property in question was the property held by a male at the time when succession opened or was it a property held by a female.

[9] In the present case it is common ground that the property in dispute was the stridhan property of Mt. Akho Kuer, and on her death it was in possession of her daughter as a limited owner. On the death of the daughter, the succession to the property opened out in March 1929 and we have to discover who the stridhan heir of Mt. Akho Kuer is under the general rule prevailing in the Mitakshara school and not under Act II of 1929. It is admitted that the succession to the stridhan property is accurately stated in para 146 of Mulla's Hindu Law, 1940 edition. It is stated therein that the property passes in the following order : (1) uterine brother; (2) mother; and in default of these it passes to (3) father; (4) father's heirs, that is, his sapindas, samanodakas and bandhus. See also the decision of this Court in 13 Pat. 550[2] where it is held that according to Mitakshara the stridhan of a woman (if she was married in the Brahma or the three other approved forms), who dies leaving no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, devolves on her husband and failing him on his nearest kinsman (sapindas). See also the decision of Dhavle J. in A. I. R. 1942 Pat. 161.[3] With regard to the property inherited by a female from a female, the succession is accurately stated in para 169 of Mulla's Hindu Law, 1940 edition, that is to say a female inheriting property (stridhan) from a female takes only a limited estate in such property and on her death it passes not to her heirs but to the next stridhan heir of the female from whom she inherited it. It follows, therefore, that on the death of Suraj Kala Kuer, the property would pass to the stridhan heir of Mt. Akho Kuer. Bacha Kuer, the defendant, is not the stridhan heir of Mt. Akho Kuer and, therefore, she has no title to this property under the general law. It is also admitted that under the general law, Ramkishun Dutt, the husband of the plaintiffs, had title to the property on the death of Mt. Akho Kuer.

[10] Mr. Mehdi Imam, however, argues that as the property must be taken to devolve upon the husband of Mt. Akho Kuer on Suraj Kala's death, it must be treated as his property from that date and thereafter by the application of Act II of 1929 the title vests in the defendant, who is the sister of Mt Akho Kuer.

[11] The cases relied on by Mr. Mehdi Imam may now be shortly dealt with. A. I. R. 1934 Pat. 324[4] is a decision of the learned Chief Justice sit-

ting single and it only decides that the question whether certain persons are the heirs under Act II of 1929 where a widow is in possession of her husband's estate as a limited owner, depends upon the date of her death and not on the date of death of the last male holder.

[12] 16 Pat. 215.[5] This case also decides that the date of death of the male owner is not material as the question as to who would be entitled to succeed to his estate as a reversioner cannot be determined until the death of the female owner. Mr. Mehdi Imam relies upon the observation at page 222 that by a fiction of law the husband's life is assumed to continue in the existence of his widow, and, therefore, he says that we must here also assume by fiction of law that Praduman Dutt was alive on the date of the death of Suraj Kala Kuer. I am unable to agree with this contention because the property was not the property of Praduman Dutt when he died, but it was the property of Mt. Akho Kuer.

[13] The case in A. I. R. 1937 Lah. 196[6] decided by Tekchand J., sitting single supports the contention of Mr. Mehdi Imam. The learned Judge held that the succession to the stridhan property of Mt. Nawahu which devolved upon her death on her husband would be governed by Act II of 1929. In my view, this decision is incorrect. I cannot understand how the succession to the property of a female could be governed by Act II of 1929 which distinctly states that it shall only apply to the succession to the property left by a male. This decision has been expressly dissented from by a Division Bench of the Madras High Court in (1946) 1 M. L. J. 196.[7] I respectfully agree with the observation of the learned Chief Justice dealing with A. I. R. 1937 Lah. 196.[6]

"Here, as there, it is not a question of deciding who are the heirs of the Hindu male. The question is who are the heirs in respect of properties belonging to a Hindu woman in her own right. In the footnote on page 84, of the tenth edition of Mayne on Hindu Law it is pointed out that the decision in A. I. R. 1937 Lah. 196[6] overlooks the express provisions in sub-s. (2) of S. 1 of the Act which limits the altered order only to the property of a male. In our judgment the correct view of the law was expressed in the judgment of a Bench of the Nagpur High Court in I. L. R. (1942) Nag. 629.[8]"

[14] A. I. R. 1937 Mad. 699[9] merely decides that it is the death of the female heir that opens the inheritance to the reversioner, and, therefore, where a Hindu male died intestate before the passing of Act II of 1929 leaving a limited female heir, who was alive after the Act came into force, the succession to the deceased male member is governed by the provisions of this Act.

[15] In my opinion, none of the cases relied upon by Mr. Mehdi Imam supports his contention, and therefore, I must hold that the title to the properties in dispute was with the husband of the plaintiffs on the date of the death of Suraj Kala Kuer.

[16] The title to the property being thus found to be with the plaintiffs, the situation is that the plaintiffs and Bacha Kuer were co-sharers, and even if it is assumed that Bacha Kuer was in possession from 1929 onwards, her possession would be the possession of a cosharer, and no question of limitation would arise. But apart from that the plaintiffs have produced the receipts (Ex. 2 series) which are printed in a tabular form at p. 12, Part 3 of the paper book. These receipts show that the husband of the plaintiffs, Ramkishun Dutt, was in possession for the years 1336, 1337, 1338, 1339 and 1340. The defendant's receipts on the other hand, which are Ex. B series, are all from the year 1339 onwards. There is only one solitary receipt (Ex. B-3) of 1336. But the learned Subordinate Judge himself has disbelieved this receipt. He says in his judgment :

"It is curious, however, to find that the receipt of special print (Ex. B (3)) was granted to the tenant Gumashta in 1336 with respect to village Raslpur, Tauzi No. 830. If we examine Ex. B (3) along with Ex. I (4) we cannot but come to the conclusion that Ex. B (3) or Ex. I (4) is a got-up paper.

The receipt Ex. B (3) must, therefore, be ruled out of consideration with the result that the defendant as was to be expected took possession after the death of the husband of the plaintiffs. The present suit, however, is filed within twelve years from the date of death of the husband of the plaintiffs. No question of limitation would arise, and the learned Subordinate Judge was wrong in holding that the suit was barred by limitation. He was no doubt influenced in taking this view by the fact that he had held that the title was with the defendant from the date of death of Suraj Kala Kuer.

[17] For these reasons, the appeal must be allowed, the decision of the learned Subordinate Judge is set aside, and the plaintiffs' suit must be decreed with costs both here and in the Court below.

**Mukharji J.**—I agree.

R. G. D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 266** *[C. N. 97.]*

AGARWALA AG. C. J. AND AYYAR J.

*Province of Bihar — Appellant* v. *Sheikh Imaman (Accused)—Respondent.*

Govt. Appeal No. 10 of 1947, Decided on 25-9-1947, from decision of Sessions Judge, Bhagalpur, D/-15-3-1947.

Cotton Cloth and Yarn (Control) Order (1943), Cl. 3 (b) — "Person carrying on the business"—Words include servant or salesman of owner.

There is nothing in the definition of the word 'dealer' involving or importing the idea of ownership or pro-

prietorship as a necessary ingredient of the expression dealer. The words "a person carrying on the business of selling cloth or yarn or both" obviously include a salesman or a servant of the owner or proprietor of the business : 32 A. I. R. 1945 Cal. 319, *Rel. on.* [Para 4]

*Case referred.*—

1. ('45) 49 C. W. N. 130 : 32 A. I. R. 1945 Cal. 319, Miss. A. Heape v. Emperor.

*Government Advocate*—for Appellant.

*Safdar Imam*—for Respondent.

**Ayyar J.** — This is a Government appeal from the judgment of the learned Sessions Judge of Bhagalpur acquitting the respondent Sheikh Imaman on a charge of having contravened the provisions of Cl. 12 (1), Cotton Cloth and Yarn (Control) Order, 1943, and thus committing an offence under R. 81 (4), Defence of India Rules. Sheikh Imaman had been convicted by the Munsif Magistrate of Bhagalpur of the said charge and sentenced to three months' rigorous imprisonment and a fine of Rs. 50 or in default further rigorous imprisonment for 15 days.

[2] It was alleged that on 2-3-1945, at about 10 P. M, the accused Imaman, who owned a cloth shop in Madhurapur Bazar, had sold eight pieces of cloth to the Station Master and the Assistant Station Master of Narainpur Railway Station at a price in excess of the controlled price stamped on the cloth in question under Cl. 10, Cotton Cloth and Yarn (Control) Order of 1943. From the evidence of the Station Master and the Assistant Station Master it would appear that the accused refused to sell at the rates stamped on the cloth and that after some discussion the Station Master sent the Assistant Station Master with a report (Ex. 1) to the police outpost nearby, complaining that the accused was charging blackmarket price. After the Assistant Station Master had left, the Station Master offered to pay the accused the prices charged by him and the eight pieces of cloth, which had been selected earlier by the Station Master and the Assistant Station Master, were cut out from the thans and kept ready for delivery. In the meanwhile, the Assistant Station Master had handed over the memo, or report (Ex. 1) at the police outpost and after a station diary entry had been made the Assistant Station Master returned to the shop followed immediately afterwards by a police officer. The total price charged by the accused for the eight pieces of cloth came to Rs. 57-5-0 and this amount was accordingly paid by the Assistant Station Master to the accused, but the police officer arrived on the scene just as the accused was putting away the money in his cash box. The amount paid, the eight pieces of cloth sold and the thans from which they had been cut out were seized then and there and the accused was also placed under arrest. The station diary entry made subsequently at the thana gives details of the excess charged by the accused on each of the eight pieces of cloth sold to the Assistant Station Master and the Station Master. The transaction in question was witnessed by a railway chaukidar and a pointsman who are said to have accompanied the two railway officers to the accused's shop. Of these the railway chaukidar was examined as one of the prosecution witnesses. The defence as put forward in the cross-examination of the prosecution witnesses was that the two railway officers wanted to buy cloth at about 10 P. M., that is, some four hours after the accused had closed the day's business, that the accused had refused to sell cloth at that hour of the night and that he had been falsely implicated for that reason. A defence witness, another shopkeeper having his shop at a distance of about two rasis from the accused shop was also examined to say that one Wahid and not Imaman was the owner of the shop; that Imaman merely used to sit at Wahid's shop and sell cloth on behalf of Wahid and that Imaman had been falsely implicated because he had refused to sell cloth after the close of business hours. This defence was disbelieved by the learned Munsif Magistrate who convicted the accused, but the learned Sessions Judge acquitted Imaman on the ground that it had not been proved that Imaman was a "dealer" as defined in Cl. 3 of the Control Order, presumably relying on the statement of the solitary defence witness just referred to. The learned Sessions Judge has not discussed other evidence in the case as he was of the view that once the prosecution failed to prove that Imaman was a dealer, there was no question of his contravening the provisions of Cl. 12, which are meant to punish a manufacturer or dealer selling or offering to sell cloth or yarn at a price higher than the maximum price specified in this behalf under Cl. 10 of the Control Order.

[3] Setting apart for the moment the statements of D. W. 1, it was not alleged on behalf of the accused at any stage of the trial that Imaman did not own the shop in question and was only a servant or salesman of Wahid. The prosecution witnesses have all referred to the cloth shop as the cloth shop of Imaman and one or two of them further gave out that Imaman was known to them from before; it was not put to any of these witnesses that the cloth shop really belonged to some one else, and the name of Wahid did not transpire in the cross-examination of any of these witnesses or even in the written statement filed on behalf of the accused. Now a perusal of the evidence of the solitary defence witness Kishun Lall, who stated for the first time that the shop belonged to Wahid and not to the accused, would show that this man was com-

pletely unreliable. Wahid was said to be a resident of Madurapur to which both the defence witness and Imaman admittedly belonged, but the witness could not even give out the name of Wahid's father. He also said that he had seen the name of Wahid as the owner of the shop on cash memos issued by the shop, but not one cash memo. was produced in support of this statement. Further, as already observed, this witness has his shop at a distance of two rasis from the accused's shop, and there are other shops intervening, and it is obvious that D. W. Kisbun Lall was a friend or sympathiser whose services had been requisitioned for the purpose of saving the accused if possible.

[4] But even if it be conceded that Wahid was the real owner of the cloth shop and not the respondent Imaman, the learned Sessions Judge does not seem to have been justified in acquitting the accused on the ground that he was not a "dealer." Clause 3 (b) of the Control Order defines a "dealer" as :

"a person carrying on the business of selling cloth or yarn or both whether wholesale or retail. . . . ."

There is, in my opinion, no warrant for the supposition that this definition necessarily excludes a salesman or a servant of the owner or the proprietor of the business, and there is nothing in the definition involving or importing the idea of ownership or proprietorship as a necessary ingredient of the expression "dealer." The emphasis seems to be on the words "a person carrying on the business of selling cloth or yarn or both" and these words will obviously include a salesman or a servant of the owner of the business. It is well known that owners or proprietors are often absentees and it can hardly be contended that in such circumstances it would be open to the man in charge of the shop or business, whether he is an agent, a servant or a salesman, to defy the law with impunity. There is no direct case of this Court on the point raised in the learned Sessions Judge's judgment, but there is a Calcutta ruling reported in 49 C. W. N. 131[1] where it was held that a salesman was also a dealer within the meaning of the Hoarding and Profiteering Prevention Ordinance of 1943. As the principle involved is the same, it makes no difference that the Calcutta case was under the Hoarding and Profiteering Prevention Ordinance and the present case is under the Cotton Cloth and Yarn Control Order of 1943.

[5] I must hold in these circumstances that whether or not the accused Imaman was the owner or proprietor of the shop he must be deemed to have been a dealer under the Control Order, the moment it is proved that he was in charge of sales at the shop in question on the day of the occurrence

[6] Mr. Safdar Imam arguing for the respondent took us through the entire evidence, as he was entitled to do, and contended that quite apart from the technical point raised by the learned Sessions Judge, there was no reliable evidence before the Court to show that the accused had sold the cloth at a price in excess of the maximum retail price stamped on the cloth. In this connection he drew our attention to the statement of the Station Master (P. W. 8) that the Assistant Sub-Inspector of Police and the Havildar had reached the shop and arrested the accused along with the money as well as the cloth sold, before the accused could return the change to the Assistant Station Master, and the admission by this Station Master and the Assistant Station Master that they could not remember the actual prices charged by the accused for each of the pieces of cloth. Mr. Imam also pointed out that the sum of Rs. 58, which is said to have been paid to the accused by the Assistant Station Master in currency notes of different denominations, were admittedly not signed or initialled and to the statement of the Assistant Station Master that "excepting oral evidence" he had nothing to show that the sum of Rs. 58 recovered from the accused represented the money paid by him. Mr. Imam finally contended that the evidence suggested that there was no sale or payment, that the railway officers were annoyed because the accused refused to sell cloth at 10 P. M. and that the *thans* of cloth seized from the shop of the accused had been cut out at the police outpost after a case had been instituted against the accused. I have examined the evidence carefully and can find no substance in these contentions. That the *thans* had been cut out at the police outpost after the arrest of the accused, with a view to bolster up a false case against him was not suggested at any stage of the trial and is in the nature of a new defence taken up for the first time before this Court. It is also perfectly clear from the evidence of all the prosecution witnesses that by the time the Assistant Sub-Inspector of Police and the Havildar reached the accused's shop, the eight pieces of cloth sold to the Station Master and the Assistant Station Master had already been cut out and that the police seized along with the money these eight pieces of cloth as well as the *thans* from which they had been cut; there was no cross-examination worth the name on this part of the prosecution story, and I regard it as a very important circumstance that the police found on arrival at the shop that the accused had already cut out the eight pieces of cloth sold to the railway officers. Similarly it was nowhere suggested on behalf of the accused that the currency notes to the value of Rs. 58 seized

from his possession belonged to him and did not represent the purchase price paid by the Assistant Station Master. The admission by the Station Master and the other witnesses that the accused had been arrested before he had time to return the change of 11 annas to the Assistant Station Master makes no difference at all to the case; according to the prices marked or stamped on the *thans* in question the accused had to pay back much more than 11 annas to the Assistant Station Master if the accused was selling the cloth at the maximum retail price stamped on the *thans*, and the fact that he would have returned 11 annas to the Assistant Station Master, if he was not arrested, would not, therefore, help him. It is true that neither the Station Master nor the Assistant Station Master could give details of the actual prices of each of the pieces of cloth sold by the accused and the excess charged on each item, but it should be remembered that the prosecution witnesses were deposing before the Munsif-Magistrate more than a year after the occurrence, that the station diary entry recorded at Madurapur outpost on 2-3-1945 and proved by the police officer contains these particulars and that it was not the accused's case that he had charged only the controlled rates for the cloth sold to the Assistant Station Master and the Station Master. It would also appear from the evidence of the Assistant Station Master and the Station Master that the accused did not issue any cash memo, and that he merely worked out the prices on a piece of paper which he kept with himself and told them that the total price came to Rs. 57-5-0; there is no reason to disbelieve this evidence and there is equally no reason to doubt the statements of these witnesses that the accused had refused to sell the cloth at the rates stamped on the *thans* and insisted on charging higher rates. It is necessary to add that there is no suggestion in the cross-examination of either the Station Master or the Assistant Station Master to lead one to suppose that they were on terms of previous enmity with the accused shopkeeper or were interested in implicating him in a false profiteering case. Mr. Safdar Imam did his best for the respondent before this Court, but his argument merely meant the piecing together of several inconsistent lines of defence and nothing more.

[7] The charge against the respondent Imaman was, in my opinion, established beyond doubt, and the Government appeal must be allowed. The order of acquittal passed by the learned Sessions Judge will be set aside and Imaman will be sentenced to three months' rigorous imprisonment and a fine of Rs. 50 or in default further rigorous imprisonment for 15 days as ordered by the learned Munsif-Magistrate. The orders passed by the learned Munsif-Magistrate for the handing over of the material Exs. I to VIII to the Station Master and Assistant Station Master along with a refund of Rs. 25-3-3 and the forfeiture to the Crown of the sale proceeds amounting to Rs. 32-12-9 will also be restored.

**Agarwala Ag. C. J.**—I agree.

D.H. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 269** *[C. N. 98.]*

SHEARER AND BENNETT JJ.

*Mrs. Dharamshila Lall — Appellant* v. *Bibi Amna — Respondent.*

A. F. A. D. No. 737 of 1947, Decided on 7-10-1947, from decision of Sub-Judge, 3rd Court, Patna, D/- 28-2-1947.

(a) Bihar House Rent Control Order (1942), S. 13 —"Conditions of tenancy" — Expression does not include condition to yield up premises demised on expiration of term or on service of valid notice to quit : (1919) 2 K. B. 301, *Rel. on.* [Paras 1 & 5]

(b) Bihar House Rent Control Order, (1942), S. 13 —Orders contemplated by section are orders of civil Court — Statutory defence under section is limited to cases where a fair rent has in fact been fixed by Controller.

The orders contemplated by S. 13 are orders of the civil Courts as there is no provision in the Order for any order for the recovery of possession of any house to be made by the Controller. Under S. 13 every tenant of a house to which the Order applies is given a statutory defence to a suit for ejectment upon the ground that he pays or is ready and willing to pay rent to the full extent allowable by the Order and performs the conditions of the tenancy. The words "rent to the full extent allowable by this Order" have the effect of limiting the statutory defence to cases where a fair rent has in fact been fixed by the Controller.

[Paras 1 & 5]

(c) Bihar House Rent Control Order (1942), S. 13 —Bihar Buildings (Lease, Rent and Eviction Control) Ordinance (1946), Ss. 2 (e) and 11 — Bihar Buildings (Lease, Rent and Eviction) Control Act, (3 [III] of 1947), Ss. 2 (e) and 11 — Tenant continuing in possession after expiry of term of his lease —Tenant willing to pay fair monthly rent already fixed by Controller — Tenant can resist suit for ejectment by virtue of S. 13 of 1942 Order — He becomes month to month tenant within S. 2 (e) of 1946 Ordinance and 1947 Act and is protected from ejectment by S. 11.

*A* took a lease of a house for a period of one year commencing on 1-2-1943 at a certain monthly rent. Subsequently on an application by the landlord the Controller fixed the fair rent of the house. *A* continued in possession of the house after the expiry of the lease on 31-1-1944 when the Bihar House Rent Control Order, 1942, was in force and was willing to pay the fair rent fixed by the Controller. The landlord brought a suit in 1944 for ejectment of his tenant *A* on the ground that she required the premises in good faith for her own use. The suit was decreed. When the appeal in the case was pending the 1942 Order was replaced by the Bihar Buildings (Lease, Rent and Eviction Control) Ordinances, 1946 which in its turn was replaced by the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947.

*Held* that (i) tenant *A* was entitled to the benefit of the statutory defence provided by S. 13 of the 1942 Order; [Para 5]

(ii) even assuming that the appeal in the case was governed by the 1946 Ordinance or the 1947 Act, *A* was a "month to month tenant" as defined in S. 2 (e) of the 1946 Ordinance and the 1947 Act and as such was entitled to the protection of S. 11 of both the Ordinance and the Act. Consequently *A* was not liable to be ejected from the house; [Para 5]

(iii) the question whether the landlord's claim that he required the premises for his own use was *bona fide* or not was a matter for the determination of the Controller under S. 11 (3) of the 1947 Act and not for the civil Court. [Para 2]

(d) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 [III] of 1947), Ss. 11 and 17—Scope —Month to month tenant—Suit against, for ejectment — Jurisdiction of civil Court is not ousted—Section gives a statutory defence—Power of executing Court to execute a decree for ejectment is taken away unless order to that effect has first been passed by Controller.

Section 11 (1) (a) read with S. 11 (2) does not oust the jurisdiction of the civil Courts to pass a decree in a suit for the ejection of a month to month tenant. They provide a month to month tenant with a statutory defence to a suit for ejectment unless the landlord can bring the case within one of the exceptions mentioned in S. 11 (1) (a). Secondly, in conjunction with S. 17 they deprive the executing Court of the power to execute a decree for the ejectment of a tenant whether the decree was passed before or after the coming into force of the Act unless an order to that effect under S. 11 (2) has first been passed by the Controller. [Para 6]

*Cases referred* —

1. (1919) 2 K. B. 301 : 88 L. J. K. B. 859 : 121 L. T. 243, Artizans, Labourers and General Dwellings Co. Ltd. v. Whitaker.
2. ('46) 25 Pat. 7 : 33 A. I. R. 1946 Pat. 385 : 224 I. C. 331, Surajnarain v. Jamil Ahmad.

*Mahabir Prasad, U. N. Sinha and A. N. Mitra* — for Appellant.

*Sarjoo Prasad and Rai Parasnath* — for Respondent.

**Shearer J.** — This second appeal, which is by the defendant, arises out of a suit in ejectment which has been decreed by both the Courts below. The defendant in the suit took a lease of a house situated in Exhibition Road, Patna, for a period of one year, commencing on 1-2-1943, and terminating on 31-1-1944. The Bihar House Rent Control Order, 1942 was extended to the area in which this house is situated by a notification issued on 24-4-1942. The plaintiff subsequently made an application to the Controller, and the Controller fixed the fair rent of the house at Rs. 90 a month. When, however, the house was let out to the defendant, the plaintiff agreed to accept a rent of Rs. 80 a month. The defendant did not, as she could have done, apply under S. 12 of the House Rent Control Order to have the period of her tenancy extended, the reason, I have no doubt myself, being that, rightly or wrongly, she was under the impression that the plaintiff had agreed, or would be prepared to agree, to her continuing in occupation as a tenant from month to month. The suit, it is not without significance, was not instituted until near the end of 1944. The defendant, in her written statement pleaded that by reason of the provisions contained in S. 13 of the Order she was entitled to continue in possession and was not liable to be ejected. It is conceded that the defendant was ready and willing to pay the fair rent fixed by the Controller. She has, it appears, deposited, as it fell due, the rent which she contracted to pay under her lease and would have deposited also the difference between that rent and the fair rent if she had been permitted to do so. Mr. Sarjoo Prasad, for the respondent, suggested that the defendant had not performed the conditions of the tenancy as one of the conditions of her lease was that she should yield up possession of the premises on 31-1-1944. The expression "conditions of the tenancy," as it occurs in S. 13 of the Order, must, however, be construed as not including a condition to yield up the premises demised on the expiration of the term or on the service of a valid notice to quit. Unless the words are to be construed in this way, it is obvious that the provision would be rendered nugatory. The same words occur in similar enactments in England and have been so construed there; *see*, for instance, the observations of Astbury J. in (1919) 2 K. B. 301.[1] The main contention put forward by Mr. Sarjoo Prasad, for the respondent, was, however, that S. 13 did not apply to decrees passed or orders made by civil Courts but to orders made by the Controller under the House Rent Control Order itself. On principle, however, there is no reason to read into S. 13 such words as "by the Controller" which do not occur there. Moreover, it cannot, I think, be properly said that there is any provision in the House Rent Control Order which enables the Controller to make an order for recovery of possession. Under the proviso to S. 4 (3) the Controller may no doubt, "direct the tenant to vacate the house" and under S. 12 (2) he may "pass an order disallowing the extension demanded by the tenant." Again, under S. 4 (2) and also under S. 12 (3) the Controller is authorised, in certain circumstances, to direct a landlord, who has succeeded in obtaining possession, to vacate the premises and restore the tenant to possession. Possibly, orders and directions of this kind were, in practice, ordinarily obeyed, under the impression that disobedience to them amounted to an offence under the Defence of India Rules. Clearly, however, if they were not obeyed, the Controller could not enforce obedience to them by legal process. In the last resort, the person in whose favour the order was made had no alternative but to go to the civil

Court and assert a statutory right to possession and obtain a decree, in execution of which he could ask for a writ for delivery of possession. This patent defect or lacuna in the House Rent Control Order was, apparently, recognised when that Order was replaced by the Bihar Buildings (Lease, Rent and Eviction Control) Ordinance, 1946, as S. 16 of the Ordinance provided that orders made by the Controller should have the effect of a decree and should be executed as such by the civil Courts. The object of the Legislature in enacting the House Rent Control Order was, as I understand it, the same as the object which the Legislature in England had in enacting the various Rent Restrictions Acts which were passed in the second and third decades of this century, namely, to prevent tenants from being compelled to pay an excessive rent by threats of being evicted. In order to achieve this object, the Legislature, in effect, restricted by statute the rights which landlords had to eject their tenants and obtain possession of their premises in order to let them out to persons who were prepared to pay a rent which the existing tenants would not agree to pay and which was an excessive rent. It is obvious that the only way in which the tenant could, in the last resort, be protected against ejectment was by refusing the landlord the legal process to which he would, in the ordinary course of law, have been entitled. That this was intended to be done and was, in fact, done, is, I think, clear when the House Rent Control Order, as originally enacted, is examined. Section 4 of the Order did not then contain either sub-s. (2) or sub-s. (3) or the proviso to sub-s. (3). The functions of the Controller were thus confined to determining a fair rent and to deciding whether an application by a tenant whose term was about to expire for an extension of the term should be allowed or disallowed. The jurisdiction of the civil Courts to entertain suits in ejectment was in no way restricted. It was open to a landlord to institute a suit in ejectment on the ground that the term of the lease had expired or the tenancy had been determined by notice. In certain suits in ejectment the tenant was, however, enabled to set up a defence which, under the law as it stood prior to the enactment of the House Rent Control Order, was not open to him, namely, that by reason of the provisions contained in either S. 4 (1) or S. 13 he was a statutory tenant or had a statutory right to continue in possession. Whether that defence was or was not a valid one was, of course, for the civil Court to determine. The position was not, I think, radically altered by reason of the successive amendments made in S. 4 by the notifications issued on 11-6-1942, and 23-6-1943. The result of these merely was that, if the Controller, on an application made to him by the landlord, decided that the landlord required the premises for his own use, the civil Court was debarred from entertaining a plea that the defendant was a statutory tenant, and, if the landlord, under the terms of the lease, was entitled to a decree, the civil Court was bound to decree the suit. When the House Rent Control Order came into operation, there must have been many landlords who had already obtained decrees in ejectment but had not yet succeeded in ejecting their tenants. I think myself that S. 13 was advisedly drawn in such a way as to enable a tenant to resist an application by the landlord for a writ for delivery of possession. Manohar Lall J. in 25 Pat. 7[2] has expressed a contrary opinion on the ground that a Court executing a decree cannot go behind the decree. But in such a case, the Court was not asked to set the decree aside or modify it; it was asked to say that, in spite of there being in existence a valid decree, the tenant had, nevertheless, a statutory right to continue in possession, and, therefore, to resist an application by the landlord for the issue of a writ for delivery of possession. The decision in 25 Pat. 7[2] was strongly relied on by the learned advocate for the respondents and also by the trial Court, but it is not, in my opinion, directly in point. At the most, it is an authority for the proposition that, when a decree in ejectment has been passed, the judgment-debtor cannot set up a statutory right to continue in possession. It is no authority for the proposition that a defendant cannot successfully set up that plea in an ejectment suit. In fact, Das J. in his concurring judgment expressed the opinion that he could.

[2] Finally, it was contended by Mr. Sarjoo Prasad for the respondent, that, as the House Rent Control Order has expired and as there was no provision corresponding to S. 13 in the Bihar Buildings (Lease, Rent and Eviction Control) Ordinance, 1946, which replaced it, the suit should be decreed now, even if it should not have been decreed by the trial Court. This argument assumes that the defendant is still a tenant for a period of one year, which period has expired. This, however, is not so. When the term of her lease expired, she became a statutory tenant in the sense that she was entitled to retain possession by reason of the provisions contained in S. 13 of the Order. Now, the word "tenant" has been defined in cl. (h) of S. 2 of the Ordinance as meaning "any person by whom, or on whose account, rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour". The Ordinance in its turn has

expired, but Bihar Act 3 of 1947, which has replaced it, contains the same definition of the word "tenant". The defendant thus still has a statutory right to continue in possession. The ground on which the plaintiff seeks to recover possession is, apparently, that she requires the premises in good faith for her own use or for the use of her dependents. Whether her claim is or is not a *bona fide* one is a matter which, under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, it is still for the Controller and not for the civil Court to determine. The plaintiff was, I think, ill advised to institute this suit. In my opinion, the appeal must be allowed and the suit must be dismissed with costs throughout.

[3] **Bennett J.** — The facts upon which this second appeal arises have been stated by my learned brother and I need not repeat them. The learned Munsif, who delivered his judgment whilst the House Rent Control Order, 1942 was still in force, having rightly decided on the authority of the decision in 25 Pat. 7[2] that that Order did not oust the jurisdiction of the civil Courts to entertain a suit in ejectment decided that S. 13 of the Order could not be relied upon by the appellant because she was in breach of a fundamental condition of the tenancy, namely, that she should vacate the premises at the expiration of the lease. The learned Subordinate Judge stated his opinion, firstly, that S. 13 of the 1942 Order could not avail the appellant, though he gave no reasons, and secondly, that as the 1942 Order had expired at the date of the appeal, it was the Bihar Buildings (Lease, Rent and Eviction Control) Ordinance, 1946, which applied and that nothing in that Ordinance operated to prevent the eviction of the appellant. The Bihar Buildings (Lease, Rent and Eviction Control) Ordinance, 1946, has now lapsed and been replaced by the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, but there is no substantial difference between the relevant provisions of the 1946 Ordinance and the 1947 Act.

[4] For the reasons hereinafter appearing, I am of opinion that the appeal must succeed whether the 1942 Order, the 1946 Ordinance or the 1947 Act is the relevant statutory provision governing the decision in appeal. It is not necessary, therefore, to consider which of these statutory provisions is the relevant provision. One of them must be relevant.

[5] The provisions of S. 13 of the 1942 Order are as follows:

"*13. Bar against orders for recovery of possession of house in possession of a tenant*—No order for the recovery of possession of any house shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Order and perform the conditions of the tenancy."

There is no provision in that Order for any order for the recovery of possession of any house to be made by the Controller. It is, therefore, clear that the orders contemplated are orders of the civil Courts and that under the section every tenant of a house to which the Order applies is given a statutory defence to a suit for ejectment upon the ground that he pays or is ready and willing to pay rent to the full extent allowable by this Order and performs the conditions of the tenancy. The effect of the words "rent to the full extent allowable by this Order" is, in my opinion, to limit the statutory defence under the section to cases where a fair rent has in fact been fixed by the Controller. The fair rent of the house here in question has in fact been so fixed and it is not disputed that the appellant is ready and willing to pay the same as and from the date of expiration of her fixed tenancy. It is urged, however, that she cannot be said to be performing the conditions of her tenancy because she has not vacated the building at the expiration of the fixed period. If this were a valid argument, it would apply equally to a tenant for month to month to whom the landlord had given a valid notice to quit and indeed in one way or another to every class of tenant whose possession the 1942 Order was clearly designed to protect and the whole order would be rendered nugatory. The English case in (1919) 2 K. B. 301[1] referred to by my learned brother shows that no difficulty has been felt with reference to a similar provision in an English Statute in distinguishing between the condition to vacate at the end of the lease and what may perhaps be called the running conditions of the tenancy. It was strongly contended that if S. 13 were so construed there was an absolute repugnancy between the provisions of Ss. 12 and 13 of the 1942 Order in that S. 13 would compel a civil Court to refuse an order for the ejectment of a tenant in a case where the Controller acting under S. 12 (2) had passed an order disallowing the application of the tenant made under S. 12 (1) for an extension of his tenancy, not being a tenancy from month to month, for a period of not less than six and not more than twelve months. But there is no such repugnancy. Section 12 enables a tenant at the end of a tenancy for a fixed period to get a limited extension of his tenancy upon the existing rent. Section 13 provides that where a fair rent has been fixed, the tenant shall not be ejected so long as he is ready and willing to pay the fair rent. The two sections are not in *pari materia* and there is no repugnancy. It follows, therefore, that in so far as the case

falls to be decided by reference to the 1942 Order the lower Courts should, in my opinion, have given the appellant the benefit of the statutory defence provided by S. 13 thereof.

[6] I turn, therefore, to the position under the 1946 Ordinance and the 1947 Act. Section 11 of the Ordinance and of the Act provides, *inter alia*, as follows:

*11.* (1) Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except (a) in the case of a month to month tenant, for non-payment of rent or breach of the conditions of the tenancy, or for subletting the building or any portion thereof without the consent of the landlord, or . . . . ; and (b) in the case of any other tenant, on the expiry of the period of the tenancy, or for non-payment of rent, or for breach of the conditions of the tenancy;

Provided. . . . .

(2) A landlord who seeks to evict his tenant under sub-s. (1) shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied that the tenant is liable to be evicted under the provisions of sub-s. (1), he shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application.

(3) (a) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of a building if he requires it reasonably and in good faith for his own occupation or for the occupation of any person for whose benefit the building is held by him: . . . ."

The term "month to month tenant" is defined in S. 2 of the 1947 Act as follows:

"'Month to month tenant' means a tenant holding a lease of a building from month to month or for an unspecified period,"

and the word 'tenant' as

"any person by whom, or on whose account, rent is payable for a building and includes a person continuing in possession after the termination of tenancy in his favour."

The 1946 Ordinance contained similar definitions. Under S. 13 of the 1942 Order, the appellant's possession so long as she continued ready and willing to pay the fair rent and perform the other conditions of the tenancy was protected and she was therefore a person "continuing in possession after the termination of the tenancy in her favour" and as such a "tenant" within the definition above set out. As such tenant she was clearly either holding a lease of a building for an unspecified period or since the fair rent was fixed and payable monthly was a tenant from month to month within the ordinary meaning of that phrase. The expression "holding a lease of a building for an unspecified period" is on its face a contradiction in terms because the first essentials of a valid lease are that it should be expressed to be for a period certain and that the dates of its commencement and expiration should be known and fixed. In the context, therefore, the word 'lease' in the defintion of a "month to month tenant" must be taken to have been used loosely to mean a tenancy. A person in possession of a building under the protection afforded by S. 13 of the 1942 Order is a 'tenant' by definition and is clearly a tenant so long as the Order remains in force, which was, at the expiration of the appellant's fixed period of tenancy, an unspecified period. At the date of the coming into force of the 1946 Ordinance and later of the 1947 Act, therefore, the appellant was a "month to month tenant" as defined in S. 2 (e) of the 1946 Ordinance and of the 1947 Act. As such, she would be entitled to the protection of S. 11 of both the Ordinance and the Act. Section 11 (1) (a) read with S. 11 (2) of the 1947 Act does not operate to oust the jurisdiction of the civil Courts to pass a decree in a suit for the ejection of a month to month tenant; what these sections do operate to do is, firstly, to provide a month to month tenant with a statutory defence to a suit for ejectment unless the landlord can bring the case within one of the exceptions mentioned in S. 11 (1) (a), and secondly, in conjunction with S. 17 of the 1947 Act, to deprive the executing Court of the power to execute a decree for the ejectment of a tenant, whether the decree was passed before or after the coming into force of the Act, unless an order to that effect under S. 11 (2) thereof has first been passed by the Controller. That being so and it being clear that the respondent cannot bring the case within any of the exceptions contained in S. 11 (1) (a) of the 1946 Ordinance and of 1947 Act the lower appellate Court should, in so far as the case falls to be governed by the provisions of the 1946 Ordinance, have dismissed the respondent's suit and this appeal whether it falls to be determined according to the 1942 Order, the 1946 Ordinance or the 1947 Act, must succeed.

[7] In so far, however, as the protection accorded to the appellant under the 1942 Order is dependent upon payment of the fair rent and since it is, therefore, that rent which is applicable to her month to month tenancy and which is therefore the rent of the building for the purposes of S. 11 (1) (a) of the 1946 Ordinance and of the 1947 Act, she will, of course, be liable to pay that fair rent to the landlord with effect from the date of expiration of her original lease, namely, 31st January 1944. With this observation, therefore, I agree that this appeal should be allowed with costs throughout.

K.S. *Appeal allowed.*

**A. I. R. (35) 1948 Patna 274** *[C. N. 99.]*

SINHA AND BENNETT JJ.

*Ramlakhan Pandey and others*—*Appellants* v. *Digbijay Narain Singh and others* — *Respondents.*

A. F. A. D. No. 1247 of 1943, Decided on 14-3-1947, from decision of Addl. Dist. Judge, Muzaffarpur, D/- 7-7-1943.

(a) Evidence Act (1872), Ss. 94 and 95 — Document not applying accurately to exsting facts — Evidence to explain it, is admissible.

Where though the language used in a document of lease is plain, it does not apply accurately to the then existing facts, S. 94 under which no extraneous considerations are admissible to determine as to what was actually leased by the document, does not apply. On the other hand in such a case evidence is admissible under S. 95 to show that the language was used with reference to the notorious facts. [Para 8]

(b) Civil P. C. (1908), O. 41, R. 4 — Decision on ground common to defendants — Any one of them may appeal from whole decree.

Where the decision in a suit proceeds on a ground common to all the proprietors namely acquisition of title by adverse possession, it is open to any one of these proprietors to appeal from the whole decree : 4 A. I. R. 1917 Pat. 152, *Expl. and Disting.* [Para 10]

Annotation.—('44-Com.) Civil P. C., O. 41 R. 4 N. 5.

(c) Limitation Act (1908), Art. 144 — Adverse possession against lessee is not adverse against lessor.

Adverse possession against the lessees as distinguished from proprietors is not adverse against the lessor : 12 A. I. R. 1925 P. C. 97 and 9 A. I. R. 1922 Cal. 87, *Foll.*; 17 A. I. R. 1930 Pat. 476, *Approved*; *Case law reviewed.* [Para 16]

Annotation. — ('42-Com.) Lim. Act, Arts. 142 and 144, N. 86.

*Cases referred.*—

1. ('39) 20 P. L. T. 563 : 26 A. I. R. 1939 Pat. 499 : 181 I.C. 486, Kamakhya Narayan Singh v. Chairman, Hazaribagh Municipality.
2. ('18) 3 Pat. L. J. 166 : 4 A. I. R. 1917 Pat. 152 : 44 I. C. 762, Mahendra Koer v. Sat Narain Lal.
3. ('30) 11 P. L. T. 447 : 17 A. I. R 1930 Pat. 476 : 126 I.C. 858, Bankey Behari Lal v. Gudu Chaudhary.
4. ('86) 13 Cal. 101, Sharat Sundari v. Bhobo Pershad.
5. ('97) 1 C. W. N. 246, Gossain Mahendra Gir v. Rajani Kant Das.
6. ('83) 9 Cal. 367 : 12 C. L. R. 19, Krishna Govind Dhur v. Hari Churn Dhur.
7. ('68) 10 W. R. 15, Woomesh Chandra Gupto v. Raj Narain Roy.
8. ('82) 9 C. L. R. 347, Prosunnomoyi Dasi v. Kali Das Roy.
9. ('72) 17 W. R. 377, Brindabun Chunder v. Bhoopal Chunder.
10. ('70) 14 W. R. 395, Lekraj Roy v. Court of Wards.
11. ('99) 26 Cal. 460, Govinda Nath v. Surja Kanta.
12. ('96) 23 Cal. 863, Gunga Kumar Mitter v. Asutosh Gossami.
13. ('98) 25 Cal. 167, Nuffer Chandra Pal v. Rajendra Lal.
14. ('94) 18 Bom. 51, Chinto v. Janki.
15. ('07) 29 All. 593, Thamman Pande v. Maharaja of Vizianagaram.
16. ('05) 27 All. 395, Mahomed Hussain v. Mulchand.
17. ('79) 4 Cal. 327, Bejoy Chunder Banerjee v. Kally Prosonno.
18. ('14) 38 Bom. 53 : 1 A. I. R. 1914 Bom. 296 : 21 I. C. 763, Krishna Dixit v. Bal Dixit Vaman Dixit.
19. ('22) 49 Cal. 257 :9 A. I. R. 1922 Cal 348: 69 I. C. 117, Katyani Debi v. Uday Kumar Das.
20. ('22) 49 Cal. 948 :9 A. I. R. 1922 Cal. 87: 69 I. C. 126, Uday Kumar Das v. Katyani Debi.
21. ('25) 52 Cal. 417 : 52 I. A. 160 : 12 A. I. R. 1925 P. C. 97 : 88 I. C. 110 (P. C.), Kalyani Debi v. Uday Kumar Das.

*S. N. Bose, Rai T. N. Sahai and B. N. Bhagat* — for Appellants.

*L. K. Jha, P. N. Gaur, K. N. Moitra and S. A. Ahmad* — for Respondents.

**Sinha J.** — This is an appeal on behalf of the defendants parties 1 and 3 from the concurrent decisions of the Courts below decreeing the plaintiffs' suit for possession and mesne profits in respect of a *mun* which has been described as a lake, but from the map attached to, and forming part of, the plaint it would appear that it is a serpentine water channel which is now closed at both ends but which at one time may have been the bed of the river Burh Gandak which flows at some distance, about a mile, from the *mun*.

[2] The plaintiffs' case, shortly stated, was that the lake in question is situate in village Bishunpur Mathura *alias* Morsandi, which in the course of this judgment, will be described as village Morasandi for breveity. It is shown in the record of rights finally published in or about the year 1897 as a part of village Morsandi in survey plot No. 2695 with an area of considerably over 200 acres. Village Nariar joins the village Morsandi on the east so that village Nariar is situate on the eastern extremity of the lake. Village Nariar contained an indigo factory which was originally an outwork of Kanti factory. It was claimed in the plaint that the water of the lake used to be utilised for the purposes of manufacture of indigo, and the fishery right was also exclusively possessed by the Nariar factory for a long period of time, much in excess of the statutory period of twelve years. As a result of this exclusive possession of the fishery rights, the Nariar factory is alleged to have acquired a right to the same by adverse possession. There was an alternative claim that, if the Court came to the conclusion that the plaintiffs were not entitled to mesne profits, they should be awarded a decree for rent for the years 1334 to 1346 fasli at the rate of Rs. 302 per year, the amount which used to be paid by the lessees to the Nariar factory.

[3] The plaintiffs traced their title to village Nariar and the lake in question in the following manner. One Mr. Toomy was in possession of the Nariar factory from before 1881 down to the year 1910 in which year Messrs Shaw Wallace & Co., and another company purchsed the Kanti and the Nariar concerns at an auction sale.

The auction-purchasers aforesaid sold the two concerns to the late Hon'ble Mr. B. N. Basu, predecessor-in-interest of the defendants fourth party, and to Babu Langat Singh, grand-father of the plaintiffs. The plaintiffs and their co-sharers continued in joint possession until there was a partition made on the basis of an award, as a result of which village Nariar was allotted to the plaintiffs' share and Kanti to their co-sharers.

[4] The defendants' title to village Morsandi is derived from the Motipur Concern, which was also an indigo factory owned by certain Europeans. The Motipur Concern appears to have been the lessee of village Morsandi since before 1861. In 1881, Mr. Toomy aforesaid, as proprietor and mukhtar of Kanti Indigo Concern and thikadar of Mauza Nariar, granted a lease to Mr. Thomas Fraser, proprietor and manager of the Motipur Concern, for a term of four years (1289 to 1292 Fasli) in respect of "mahal jalkar mun situate in Mauza Nariar." The deed evidencing the lease (Ex. A-1) is dated 27-6-1881, but is not registered. In the record of rights finally published in or about the year 1897 the Kanti Concern is shown as the thikadar of village Morsandi, and the Motipur Concern as the Katkenadur (sub-lessee). It appears further that in the year 1894 the Motipur Concern purchased a six pies share in the proprietary interest in village Morsandi, and, subsequently, in or about the year 1920, the concern acquired another six annas six pies proprietary interest therein. Hence, by the year 1920, the Motipur Concern was not only lessee in respect of the village Morsandi but also a co-sharer proprietor to the extent of about seven annas share. It appears further that in 1922 the Kanti Concern also acquired a small share in the proprietary interest in village Morsandi. In 1927, the Motipur Concern conveyed their right, title and interest in village Morsandi to the defendants first party, that is to say, the defendants first party acquired by their purchase aforesaid a seven annas share in the proprietary interest and a leasehold in respect of the entire village excepting a two and a half pies share which was under the Court of Wards. The Motipur Concern also executed a deed of surrender in favour of the plaintiffs and the defendants fourth party in respect of their rights under the lease of the year 1881, referred to above.

[5] To continue the plaintiffs' case, they alleged further that seven annas milkiat share in village Morsandi and their interest in the village as lessee and sub-lessees except in respect of a two and a half pies share continued in possession of the Motipur Concern until the transfer aforesaid in favour of the defendants first party. The plaintiffs continued to receive rent for the lake in question until November 1927, that is to say, until the surrender by the Motipur Concern in favour of the plaintiffs. When the defendants first party came on the scene, they began to interfere with the plaintiffs' possession over the lake, with the result that a proceeding under S. 147, Criminal P. C., was started. The proceeding ended partly in favour of the plaintiffs and mostly in favour of the defendants in that the plaintiffs' possession in respect of one-fifth portion of the lake in its eastern extrimity and the defendants' possession in respect of the remaining four-fifths western portion was declared. It was further decided by the learned Magistrate — it does not appear under what provision of law—that the plaintiffs were entitled to recover Rs. 302 per year from the defendants second party as rent. This adverse decision against the plaintiffs for the four-fifths western portion of the lake was alleged to be the cause of action for the suit, as, it is said, the defendants first party dispossessed the plaintiffs from the portion aforesaid, with an area of 183.45 acres, in Aswin 1334 Fasli. The contesting defendants, including the defendants first and many of the defendants third parties, contested the suit alleging *inter alia* that the lake in question remained all along in possession of the owners of the Motipur Indigo Concern as lessees of the village Morsandi, and not as lessees under the Kanti Concern (which included the Nariar Concern); that the plaintiffs had not acquired any right to the lake by adverse possession nor did they realise any rent in respect of the same from the Motipur Concern; that, if any rent was paid to the Nariar Concern, it must have been in respect of the jalkar in village Nariar itself; and that the proprietors of the Kanti Concern had a permissive use of the water of the lake for manufacture of indigo.

[3] On these pleadings, the most important issue in the case was Issue No. 2, which runs as follows: "Have the plaintiffs acquired any right, title or interest in the lake in dispute?" The learned Subordinate Judge, on a consideration of the voluminous oral and documentary evidence, came to the conclusion that the disputed mun was known as Nariar mun: that the Motipur Concern had been in possession of a portion of the mun in question till 1927 as a tenant of the Nariar Kothi as an annual rental of Rs. 302; that after surrender by the Motipur Concern, the maliks of Nariar Kothi came in possession of the fishery rights in dispute and that the plaintiffs were dispossessed in Aswin 1334 Fasli, as alleged by them. On the question of whether the disputed fishery rights had been sold by the Nariar Concern to the plaintiffs he came to the

conclusion that the entire Kanti Concern, with all its properties and outworks, was sold, and, even though the fishery rights in question had not been specifically mentioned in the sale deeds (Exs. 6 and 6-A), they must be deemed to have been included in the general description of the properties sold as contained in those documents. He further held that the adverse possession of the disputed fishery by the plaintiffs' predecessor-in-title began from June 1881, apparently on the basis of the patta of that year (Ex. A-1), and that possession continued till 1343 Fasli. Hence, he concluded by holding that the plaintiffs had acquired title to the disputed fishery by adverse possession for more than 12 years ending within the period of limitation for the suit.

[7] On appeal by the defendants first and some of the defendants third parties, the learned Additional District Judge came to the conclusion that the Motipur Concern was in possession of the disputed fishery all along. But he pointed out that it was a difficult question to find out in which capacity the Motipur concern was in possession of the disputed fishery, inasmuch as it derived its title to village Morsandi as lessees from the Kanti Kothi, as a cosharer of a part and as a thekadar of another part and as a Katkenadar of another share in village Morsandi. He further found that the jalkar in question was settled by Mr. Toomy in 1881 with the Motipur concern at an annual rent of Rs. 291. On the question of adverse possession, he came to the conclusion that the plaintiffs' predecessors-in-title had not acquired any rights by adverse possession until the year 1900, and that after 1922 there had been certain transaction which would make it doubtful as to whether they could claim title by adverse possession. Hence, his conclusion was that the plaintiffs, including their predecessors-in-title, had been adversely possessing the disputed fishery for more than 12 years between the years 1900 and 1922 on the ground that during this period it had not been established that the Kanti concern or the Nariar concern had any interest in the proprietary rights in village Morsandi. In the result, he agreed with the trial Court in decreeing the suit for recovery of possession and mesne profits to be determined in a separate proceeding. Hence this second appeal by defendants 1 and 3 parties.

[7a] Mr. S. N. Bose on behalf of the appellants has raised mainly three contentions, namely, (1) that the Courts below erred in law in their construction of Ex. A-1, the lease of the year 1881, in coming to the conclusion that the disputed fishery was settled by the Nariar concern, with the Motipur concern, the predecessors-in-title of defendants first party; (2) that the plaintiffs suing in ejectment must prove that they had acquired any right in the disputed fishery by virtue of the sale deed of the year 1912 or that their vendors had purchased the disputed fishery by the auction sale of the year 1910; and (3) that adverse possession against the lessees, that is to say, the Motipur concern, would not be adverse to the lessors, that is to say, the proprietors of village Morsandi. Other subsidiary questions were raised and argued at great length; but they are, more or less, branches of arguments relating to the three main points set out above.

[8] On the first question, Mr. Bose has argued that under S. 94, Evidence Act, no extraneous consideration could be admissible to determine as to what was actually leased by the document of the year 1881 (Ex. A-1). The document had been officially translated, and, as the original translation was found to be incorrect on the admission of the Head Translator himself, who appeared before us, we directed him to make a revised translation and that was done. On the revised translation, it would appear that, by virtue of that document, Mr. George Toomy let out to Mr. Thomas Fraser proprietor of the Motipur concern, "*Mahal Jalkar mun* situate in *Mauza* Nariar." Mr. Bose contended that this document taken at its face value is, as the words are absolutely clear and unambiguous, to the effect that the jalkar which was subject-matter of the settlement was situate in mauza Nariar. But the Courts below, relying upon oral evidence mainly, have come to the conclusion that the disputed jalkar was generally known in the locality as situate in Nariar, as it is contiguous to the west of village Nariar. The Courts below have further found that, though from the thakbust map, the revenue survey map and the cadastral survey map it was clear that the jalkar in question was situate in village Morsandi, it was popularly believed, perhaps under a misapprehension of the true position, that the jalkar was situate in village Nariar. They have further found that the Motipur concern took a lease of the jalkar from the proprietor of the Kanti concern, which included the Nariar concern, under the misapprehension that it appertained to village Nariar. Mr. Bose contended on that finding that it could not be the basis for a claim by adverse possession because both parties were under a misapprehension that the jalkar in question appertained, as a matter of fact, to village Nariar. Reliance was placed in this connection on the decision of a single Judge of this Court in 20 P. L. T. 563.[1] But in that case the learned Judge was concerned with deciding as to whether the defendant Raj was estopped from denying the title of the landlords, the municipal corporation. In that case it had

been found, as a matter of fact, that for more than 50 years the Raj went on paying rent to the municipality under the misapprehension that the bungalow in question was situate on land belonging to the municipal corporation, though, as a matter of fact, it was the property of the defendant himself. In those circumstances, his Lordship held that a tenancy in that case could not have been created because the land did not belong to the so-called lessor, and that there was no estoppel. It is apparent from the decision in that case that the question of adverse possession was not mooted. On the main question of the construction of the document of 1881, the Courts below have referred to evidence, mainly oral, showing that there was no such lake (mun) as is referred to in that document in village Nariar itself, and that the lake in dispute in this case was popularly called the Nariar mun. On these findings, it is clear that S. 94, Evidence Act, cannot be pressed in aid of the appellants, inasmuch as the language used in the document of 1881 does not apply accurately to existing facts; on the other hand, S. 95, Evidence Act, may be relied upon on behalf of the respondents in view of the findings of fact referred to above. Though the language in that document is plain in itself, it would be unmeaning in reference to the facts existing at the time, and, therefore, evidence was admissible to show that that language was used with reference to the notorious facts, and the illustration to S. 95 makes the intention of the section clearer still. Hence, in my opinion, there is no substance in the first contention raised on behalf of the appellants.

[9] As regards the second contention, the trial Court, as already indicated held that, though the documents of title in favour of the plaintiffs did not specifically refer to the fishery right in dispute in this case as all the properties of the Nariar Concern were intended to be transferred to them, the fishery rights also must be deemed to have been included in the sale deed under which the plaintiffs claim. The point does not appear to have been specifically raised before the lower appellate Court, and, therefore, the learned Additional District Judge has not recorded a distinct finding on this question. If this were the only point arising for decision in this appeal, I would have been inclined to take the view that this point was not specifically urged before the lower appellate Court; but as, it will presently appear, the case has got to be remanded for a fresh decision on certain points to be indicated hereinafter, this contention also may be the subject-matter of a finding by the lower appellate Court after remand. Mr. L. K. Jha contended that the question was not very material in view of the fact that, even apart from their predecessors' title by adverse possession, the plaintiffs themselves have independently acquired the right by prescription. This contention would have been well-founded, if the findings of the learned Subordinate Judge had been confirmed in their entirety by the lower appellate Court; but, as shown above, the lower appellate Court came to the conclusion that there was no such adverse possession as would entitle the plaintiffs' predecessors-in-title to claim the fishery in dispute by prescription before the year 1900 nor has it found that the adverse possession continued after 1922; in other words, the lower appellate Court held that the plaintiffs and their predecessors-in-title had acquired title by adverse possession for more than twelve years between the years 1900 and 1922. But the plaintiffs claim the property by the sale deed of 1912 which in terms does not refer to the fishery in question. The plaintiffs, therefore, had been in adverse possession in their own rights between 1912 and 1922 which period is not enough to lead to the acquisition of rights by adverse possession. Hence, this question cannot be said to be altogether immaterial. In this connection the further question which has not been discussed in this case by the lower appellate Court would be whether the plaintiffs could tack on their adverse possession to that of their predecessors-in-title.

[10] The most important point raised on behalf of the appellants by Mr. Bose is whether adverse possession against the Motipur Concern, who were in possession of village Morsandi in their several capacities of part-proprietors, lessees in respect of a portion of the village and sub-lessees in respect of the rest, could be adverse possession against the proprietors themselves who are defendants third party to the suit and are also some of the appellants in this Court. Mr. L. K. Jha on behalf of the respondents contended that this question had not been raised by the appellants in the Court below, and, therefore, could not be raised in this Court for the first time not because as pure question of law it could not be raised at the second appeal stage but because, he contended, there was no finding upon which this argument could be founded. Mr. Bose, on the other hand, has contended that there is a finding in the judgment of the lower appellate Court, and that this point was raised there, but that the learned Judge has not recorded any finding on this question of law, though in the beginning of his judgment he set out to do so. It appears to me that it was admitted in the plaint read as a whole that the Motipur Concern, before their transfer in favour of the defendants first party in 1927, were in possession of village Morsandi in those several capacities. The plaintiffs were interested to make that assertion

with a view to showing that the Motipur Concern were representing all the interest in the village against which the adverse possession of the plaintiffs and their predecessors-in-title operated. Though in the beginning of his judgment, the learned Additional District Judge sets out the fact that the decision of the question of adverse possession had become complicated in view of the fact that the Motipur Concern were occupying different capacities in relation to the village Morsandi, he does not deal with the question of whether adverse possession against the lessees would be adverse to the lessors, that is to say, the proprietors represented by the defendants third party. It would, therefore, appear that, though the foundation was there, or least there was room for the contention, the learned Judge did not decide that question because it was not raised in that lucid form. The judgment of the learned Additional District Judge is unnecessarily long and involved, and it is not very easy to make out what he actually started to decide and what exactly his findings were. Were it not a fact that he was a Judge who had just started his career as such, I would have been reluctant to make the order of remand which I propose to do in this case. It is not clearly found as to when the Motipur Concern acquired their proprietary interest in village Morsandi to the extent of seven annas. Mr. Bose informed us with reference to the sale deed (EX. A2), which is the document of title in favour of the defendants first party, that the concern acquired six and a half annas share in the proprietary interest as late as 1920, and that it had acquired only six pies share in the proprietary interest in 1894. The record of rights finally published in 1897 shows the Kanti Concern as the lessees of village Morsandi and the Motipur Concern as the sub-lessees. But that does not indicate as to when the interest of Kanti Concern as lessees of village Morsandi arose for the first time. The learned Additional District Judge has referred to the evidence of a very old man over ninety years in age, who, by word of mouth, has purported to disclose that that interest arose in or about the year 1893. How far that oral testimony can be trusted is not for us to say sitting in second appeal. But the lower appellate Court after remand will have to look into that matter also. In spite of all this vagueness in the findings of the learned Additional District Judge, one thing appears to be clear that the Motipur Concern, for the most part of the years 1900 and 1922, occupied the position of lease-holders, either directly or indirectly, in respect of the major portion of the village Morsandi. Hence, it becomes very relevant to consider whether the adverse possession of the plaintiffs and their predecessors-in-interest during that period could be adverse to the proprietors represented by the defendants third party. In this connection I may notice another contention raised on behalf of the respondents by Mr. Jha, namely, that all the proprietors, defendants third party, were not appellants either in the lower appellate Court or in this Court. It was, therefore, claimed by Mr. Jha that this contention could avail only those of the proprietors who actually figured as appellants in this Court or in the Court below. Mr. Bose referred to the provisions of O. 41, R. 4, and contended that it was open to any one of these proprietors to appeal from the whole decree, as the decision proceeds on a ground common to all of them, namely, acquisition of title by adverse possession. In my opinion, this contention is well-founded. In this connection Mr. Jha referred to the decision of this Court in 3 P. L. J. 166.[2] On the basis of that decision he contended that, as the defendants third party had defined interests in aliquot portions of the *zamindray* in village Morsandi, their interests were separable, and, therefore, the *dictum* of their Lordships in the case referred to above should be applied to the facts of the present case. In that case the head-note runs as follows :

"An order in appeal by one of several defendants enures to the benefit of the other defendants only if the interests of the latter are inseparable from the interest of the defendant-appellant."

Those observations must be read with reference to the facts of that particular case. That was a mortgage action in which there were several items of properties mortgaged. One of the parties had purchased one of the mortgaged properties at a revenue sale, and on his appeal the appellate Court exonerated his property from liability under the mortgage. In those circumstances, their Lordships held that the benefit of that judgment could not be available to the other defendants who were either the mortgagors or puisne mortgagees. It is, therefore, clear that that decision is of no advantage to the respondents in so far as the applicability of R. 4 of O. 41, Civil P. C. is concerned. It was next contended on behalf of the respondents that the Motipur Concern having surrendered their lessees' interest in respect of the fishery in favour of the plaintiffs, the defendants could not challenge the plaintiffs' title. But that argument can avail only against defendants first party and not against the defendants third party who are the proprietors, because the Motipur Concern, in surrendering those rights, were acting in their capacity of the lessees under the deed of 1881.

[11] From what has been said above, it is clear that the question of whether adverse possession against the lessees would be adverse

against the proprietors of village Morsandi is a very vital one for the purposes of this case. Mr. Bose relied upon the decision of a Division Bench of this Court in 11 P. L. T. 447.[3] In that case it was laid down that possession taken by a trespasser during the currency of an ijara lease does not become adverse to the lessor until upon expiration of the term. Reliance was placed upon the decisions of the Calcutta High Court in 13 Cal. 101[4] and 1 C. W. N. 246.[5] The ruling reported in 13 Cal. 101[4] is a clear authority for the proposition that the dispossession of the ijaradar was not the dispossession of the zamindar. But it would appear from the following observations of their Lordships of the Calcutta High Court that there was a conflict of decisions, and that they preferred to follow the latest decision then reported in 9 Cal. 367:[6]

"Various rulings of this Court have been cited before us. It appears that there is a conflict of decisions in this Court on this point. 'The latest ruling, 9 Cal. 367,[6] is in favour of the view taken by the lower Courts. It follows an earlier ruling : 10 W. R. 15.[7] Having considered these and the other cases to which we were referred, we are of opinion that the view taken by the lower Courts on this point is correct. For the reasons given in 9 Cal. 367,[6] we are of opinion that the present case is governed by Art. 144, Limitation Act, and that as the adverse possession of the defendant against the plaintiff commenced only on the termination of the ijara lease, within twelve years of the suit, the suit is not barred."

Their Lordships of the Calcutta High Court (Wilson and Field JJ.), who decided the earlier case reported in 9 Cal. 367 = 12 C. L. R. 19,[6] referred with approval to the decision in 10 W. R. 15,[7] and held that possession adverse to the ijaradars was not possession adverse to the proprietors.

[12] But Mr. Jha on behalf of the respondents very strongly relied upon an earlier decision of the Calcutta High Court in 9 C. L. R. 347[8] in which a Division Bench, consisting of Prinsep and Field JJ. laid it down that adverse possession against the lessee is adverse to the lessor also. They refer to the earlier decisions of the Calcutta High Court in 17 W. R. 377[9] and 14 W. R. 395.[10] They also observe that, according to the law of other countries, possession adverse to a lessee is also adverse to his lessor, but do not specifically refer to any such authority. They conclude their *ratio decidendi* by making the following observations :

"In England, it is an ordinary covenant in a lease that the lessee will protect the property leased from encroachment so as to hand back the property to his lessor upon the expiry of the lease in the same state in which he had received it. But it is unnecessary for us in the present case to decide this point specifically, although we believe that it may be laid down as a general principle of law that it is incumbent upon every lessee to protect his lessor's property from encroachment or unlawful eviction; and that if he fails to do so, he exposes himself to an action for damages by his landlord."

[13] It would appear from the quotation given above from their judgment that their Lordships made those observations which were in the nature of *obiter dicta*. One thing is clear from the judgment that the decision of their Lordships of the Calcutta High Court in 10 W. R. 15[7] was not brought to their notice. It is also significant that Field J. was a party to the decision in the case reported in 9 Cal. 367.[6] It is further clear that the Calcutta High Court, on different occasions, took conflicting views on the question, and their Lordships, on different occasions, chose their own view of the matter in preference to the view taken by another Division Bench of the same Court. In such circumstances, perhaps the better course would have been to refer the matter to a larger Bench for settling the controversy more authoritatively. Be that as it may, it is also clear that there is no later decision than the one reported in 13 Cal. 101,[4] taking a different view to that propounded in the last mentioned case. On the other hand, we have a later decision of the same Court in the case in 1 C. W. N. 246[5] in which the principle laid down in 13 Cal. 101[4] was not dissented from; but their Lordships distinguished that case, and observed as follows :

"In the case of an estate granted in ijara if the ijaradar goes on paying the ijara rent to the proprietor, though a third person might dispossess the ijardar, still there will be no interference with the possession of the proprietor; but whereas in this case an estate is in the occupation of ordinary tenants and the defendant has been in possession of the estate, which ordinarily would mean that he is in possession by receipt of rent from those tenants, it is difficult to understand how the proprietor can still say that he is in possession, or that his possession has not been interfered with, unless he is able to show that the tenants had been paying rent to him all the while. Therefore, in a case like the present, before it can be determined whether the suit is barred or not it must be found upon the evidence whether the tenants who were in occupation of the land had been paying rent to the plaintiffs or to the defendants. If they had been paying rent to the defendants and not to the plaintiffs, possession must be held to have been with the defendants, and a complete cause of action must be deemed to have arisen to the plaintiffs. On the other hand, if the plaintiffs had been in receipt of rent from the tenants, and if such receipt of rent extended to a period within twelve years before the date of the institution of the suit, the suit should not be held as barred by limitation."

[14] But Mr. Jha referred us to the decision in 26 Cal. 460.[11] In that case, as would appear from the head-note itself, the land in dispute had been let out in *patni* and *darpatni* leases by the predecessor-in-interest of the plaintiffs. During the continuance of those leases, the land in dispute was taken possession of and held adversely by the defendants or their predecessors. On the relinquishment of the *patni* and

*darpatni* leases by the lessees in favour of the plaintiffs in June 1891, the plaintiffs brought a suit for recovory of possession of the disputed land from the defendants in June 1893. The Court accepted the plea of limitation raised by the defendants, who had been found to be in possession for more than twelve years before the institution of the suit on the ground that, under Art. 144, Limitation Act, adverse possession began to run from the date the defendants came in possession of the property in question, and not from the date that the plaintiffs came in possession as a result of the relinquishment. The earlier decisions of the same Court in 13 Cal. 101,[4] 23 Cal. 863[12] and 25 Cal. 167[13] as also 18 Bom. 51[14] which had been relied upon on behalf of the plaintiff-appellant, were distinguished by the Court on the ground that the plaintiffs before them derived their right to sue for *khas* possession through the *patnidars* and *darpatnidars* who were entitled to *khas* possession and who had relinquished such a right in the plaintiffs' favour. They further held that such a relinquishment operated only as a transfer of the tenure not only as a matter of general principle but also on the express terms of section 12 of Regulation VIII of 1819. They further observed that in 13 Cal. 101[4] the position was different, because the *zamindar* became entitled to possession in his own rights upon the expiry of the term of the *ijara*, and not through the *ijaradar*. On the other hand, in the case before them the plaintiffs became entitled to *khas* possession by the relinquishment of the *patnidars* and *darpatnidars*, and therefore, they were affected by the adverse possession against the *patnidars* and *darpatnidars* whose rights they had acquired through their voluntary relinquishment. Hence, it must be held that the ruling in 26 Cal. 460[11] does not lay down any proposition contrary to that in 13 Cal. 101.[4] Hence, so far as the Calcutta High Court is concerned, the latest decision of that Court is in favour of the view that adverse possession against the lessee in possession is not advarse to the lessor.

[15] So far as the other High Courts are concerned, a Division Bench of the Allahabad High Court in the case in 29 ALL. 593[15] followed the principle laid down in 13 Cal. 101[4] and in the earlier decisions of the Calcutta High Court referred to above as also in an earlier decision of their own Court in 27 ALL. 395.[16] On the other hand, the several decisions of the Calcutta High Court relied upon by Mr. Jha on behalf of the respondents, namely the cases in 14 W. R. 395,[10] 17 W. R. 377,[9] 9 C. L. R. 347[8] and 26 Cal. 460[11] were not followed. Their Lordships have quoted with approval the classical observations of Markby J. in 4 Cal. 327[17] at p. 329:

"By adverse possession I understand to be meant possession by a person holding the land on his own behalf or some person other than the true owner, the true owner having a right to immediate possession."

They also approved of the *dictum*, and applied the same to the case of a lessee that possession during the period of usufructuary mortgage is not adverse to the true owner. The same view appears to have been taken by a Division Bench of the Bombay High Court in 38 Bom. 53.[18]

[16] A further development of the case-law on the subject which was not placed before us during the argument at the bar makes it clear that adverse possession against the lessee does not become adverse to the lessor. It appears that a litigation which came up to the Calcutta High Court before a Division Bench involved the question now under discussion, though not directly. The suits in those cases were for arrears of rent in respect of a permanent lease, and the tenant claimed abatement of rent on the ground that a large portion of the leasehold property had gone out of the tenure by adverse possession acquired by a third party. In that connection the question was mooted whether adverse possession against the lessee could be adverse to the lessor so as to make it obligatory upon him to recognise the position that the area of the original tenure had decreased as a result of title having been acquired by a third party by adverse possession. On this question, Woodroffe J. took the view that the adverse possession affected the landlord also; on the other land, Cuming J. took the contrary view. Their decisions are reported in 49 Cal. 257.[19] On Letters Patent appeal, the Bench consisting of Mookerjee, Newbould and Pearson JJ. took the view that the possession of a trespasser, during the continuance of a lease, does not become adverse against the lessor, as the lessor is in possession by receipt of rent from the lessee, and that so long as such rent is not intercepted by a trespasser he cannot be said to have been dispossessed. Mookerjee J. elaborately reviewed all the relevant authorities, both Indian and English, on the subject in the course of his judgment: *see* 49 Cal. 948.[20] The matter was carried to their Lordships of the Judicial Committee of the Privy Council. Their Lordships' decision is reported in 52 Cal. 417 : 53 I. A. 160[21] which affirmed the decision of the High Court in 49 Cal. 948.[20] In the course of his judgment, Lord Salvesen made the following observations :

"It was argued that the lessor had a title to eject the trespasser and that, if he did not do so, the trespasser obtained a title by limitation against him as well as against the tenant and that, as the latter is now

deprived of the possession of the lands, she is entitled, in a question with the landlord, to an abatement of rent. There is a long and consistent body of authority to the opposite effect in India, and although the matter has not been made the subject of direct decision by this Board, their Lordships see no ground for doubting the soundness of the decisions referred to in the judgment of the High Court."

[17] It would, therefore, appear that the course of decisions relied upon on behalf of the appellants has been approved by their Lordships of the Judicial Committee, and it must, therefore, be taken that they have disapproved the line of decisions of the Calcutta High Court to the contrary effect on which Mr. Jha greatly relied on behalf of the respondents. We reserved judgment in this case in order to consider the conflicting view points raised on behalf of the parties as they appeared to have been supported by high authority on either side. On further consideration of the matter, and particularly after discovering the opinion of their Lordships of the Judicial Committee in the case referred to above, it is perfectly clear that the view of this Court in 11 P. L. T. 447[3] is the correct one, and that Mr. Jha was wrong in contending that that decision had not taken the correct view of the legal position.

[18] Having come to the decisive conclusion that adverse possession against the Motipur Concern in this case could not in law be adverse to the proprietors of village Morsandi, there should have been no difficulty in allowing the appeal and dismissing the suit but for the fact that the lower appellate Court has not recorded clear findings of fact on the questions involved in this case, as already indicated. If the lower appellate Court had not confused the two view points, namely, of the lessees and of the proprietors, and had it recorded clear findings as to the capacity in which the Motipur Concern was in possession of village Morsandi during the critical years 1900 to 1922, during which period the plaintiffs have been found by the lower appellate Court to have acquired title to the fishery in dispute by adverse possession, I would have no difficulty in disposing of the appeal here. But, in my opinion, it is necessary that the lower appellate Court should review the evidence bearing on the question of adverse possession from the point of view of the proprietors as distinguished from that of the lessees, the Motipur Concern.

[19] As a result of these considerations, I would set aside the judgments and decrees passed by the Courts below, and remit the case for a fresh decision by the lower appellate Court on the evidence already on record. The lower appellate Court after remand will have to decide specifically the question of whether during the period 1900 to 1922 the plaintiffs' possession was or was not adverse to the proprietors of village Morsandi. The other questions, more or less of subsidiary character already indicated in the course of this judgment, will also require the consideration of the lower appellate Court. The appeal is accordingly allowed. Costs here and in the Courts below both before and after remand will abide the result, and will be disposed of by the lower appellate Court.

[20] **Bennett J.** — I agree.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 281** *[C. N. 100.]*

BENNETT AND BEEVOR JJ.

*Ramudar Singh and others* — *Appellants* v. *Ramsurat Singh and others*—*Respondents.*

A. F. A. D. No. 1270 of 1945, Decided on 3-4-1947, from decision of Addl. Sub-Judge, Darbhanga, D/-27-6-1945.

(a) Civil P. C. (1908), O. 32, R. 3—Non-representation—Suit on mortgage against father and minor sons — Suit against minors dismissed in default of appointment of guardian-ad-litem — Preliminary decree passed against father alone — Father dying — Application for final decree impleading minors under guardianship of their mother — Notice of application served on mother—Final decree passed — Land sold in execution thereof — Notice under O. 21, R. 22 served on mother in execution — Mother not appearing either in suit or in execution — No order appointing guardian-ad-litem — Minors held not represented in suit or execution — Decree and consequent sale held not binding on minors.

A suit was brought against the father and his minor sons on a mortgage bond executed by the father. The suit was dismissed against the minors in default of appointment of guardian-ad-litem and a preliminary decree was passed against the father alone. The father subsequently died. In an application for final decree the minors were impleaded under the guardianship of their mother and a notice of the application was served on the mother. A final decree was made and put in execution and a notice under O. 21, R. 22 was served on the mother. The land was put up to sale and purchased by the decree-holder who obtained delivery of possession. The mother did not appear either at the time of the making of the final decree or in the execution proceedings and no other guardian was appointed for the minors either in the suit or in the execution proceedings and there was also no formal order appointing the mother as guardian-ad-litem. The minors brought a suit for declaration that the mortgage decree and the sale held in execution thereof were null and void and were not binding on them :

*Held* (1) that the plaintiffs were not effectively represented in the suit and there was no decree against them at all and they were never in any real sense parties to the decree. They were therefore not bound by the decree and the sale held in execution was a nullity as against them ; [Paras 11, 17]

(2) that the issue of notice under O. 21, R. 22 had no effect at all unless it was issued in the name of a person who had either been appointed or recognised by the Court as guardian-ad-litem and therefore the position of the plaintiffs in this case was the same as if no notice had been issued under O. 21, R. 22 at all: *Case law discussed.* [Para 13]

Annotation:—('44-Com.) C. P. C., O. 32, R. 3 N. 5.

(b) Civil P. C. (1908), O. 32 —Effective representation — Order does not deal with substantive rights but only provides statutory means of securing representation of minor — Test to decide question whether minor was bound by decree or order passed against him is to see whether he was effectively represented in proceedings leading to such decree or order — Mere failure to comply with letter of O. 32 will not prevent minor being bound by decision in proceedings if he had been effectively represented therein. (Per Bennett J ).

*Per Bennett J.*—A minor is not bound by any proceedings taken against him during his minority unless he was a party thereto. Whether a minor was or was not a party to any such proceedings depends upon whether or not he was effectively represented therein. The failure to comply with the letter of O. 32, will not prevent the minor being bound by the decision in any proceedings, if, in fact, in the circumstances of the particular case he can properly be said to have been effectively represented therein. Order 32 does not deal with substantive rights and only provides statutory means of securing the representation of a minor in civil proceedings. There is nothing in that order to indicate that provided that the letter of the order is followed, the minor will be bound by the decision, although in fact he was never effectively represented in the proceedings; nor can such an intention, which is against the dictates of justice, equity and good conscience, in that it would open the door to undetectable fraud whereby many minors would be deprived of their rights and inheritance, be attributed to the Legislature. [Para 15]

When, therefore, any question arises as to whether a person is bound by any decree or order of a Civil Court passed during his minority, the proper and only test is whether he was so effectively represented in the proceedings leading to the decree or order in question as in justice, equity and good conscience to justify, in the circumstances of the particular case, the conclusion that he was in fact a party to those proceedings. All such questions as to whether a guardian-ad-litem was duly appointed or recognised by the Court either under the provisions of O. 32, or otherwise or whether the guardian so appointed had cosented to act, or whether some notice required by O. 32, or subject thereto, by any other provision of law or whether the guardian actually appeared in the proceedings or whether the guardian took the proper and necessary steps to safeguard the interests of the minor, are entirely subordinate to the test of effective representation and no one of them constitutes in the circumstances of every case a complete answer to that test. [Para 16]

Annotation : ('44-Com.) C. P. C., O. 32 (General), N. 1.

*Cases referred:*—

1. ('37) 16 Pat. 632 : 25 A. I. R. 1938 Pat. 97 : 173 I. C. 644, Baraik Ram Gobind Singh v. Chowra Uraon.
2. ('23) 2 Pat. 335 : 10 A. I. R. 1923 Pat. 242 : 71 I. C. 705, Satdeo Narain v. Ramayan Tiwari.
3. ('27) 54 Cal. 450 : 14 A. I. R. 1927 Cal. 488 : 103 I. C. 124, Satish Chandra v. Hasemali.
4. ('21) 2 P. L. T. 617 : 8 A. I. R. 1921 Pat. 293 : 63 I. C. 484, Rampirit Prasad v. Thakur Saran.
5. ('22) 3 P. L. T. 451 : 9 A. I. R. 1922 Pat. 291 : 66 I. C. 137, Chhattra Kumari Devi v. Panda Radha Mohan Singari.
6. ('23) 2 Pat. 7 : 9 A. I. R. 1922 Pat. 448 : 72 I. C. 637, Sajjad Husain v. Sakal Rai.
7. ('03) 30 I. A. 182 : 30 Cal. 1021 : 8 Sar. 512 (P. C.), Mt. Bibi Walian v. Banke Behari Pershad Singh.
8. ('29) 16 A. I. R. 1929 All. 252: 115 I. C. 462, Kalloo v. Niadar Singh.
9. ('44) 23 Pat. 528 : 32 A. I. R. 1945 Pat. 1 : 217 I. C. 337 (F. B.), Ajab Lal Dubey v. Hari Charan Tewari.

*Girija Nandan Prasad* —for Appellants.

*R. Choudhury* — for Respondents.

**Beevor J.**—This is an appeal by the defendants against a decision of the Additional Subordinate Judge of Darbhanga who, reversing the decision of the first Munsif of Darbhanga, has, on appeal, decreed, a suit for a declaration that a decree passed in mortgage suit. No. 199 of 1934 and the sale held in execution thereof in Execution Case No. 572 of 1936 on 21-12-1936, and the delivery of possession following thereon are null and void and are not binding on the plaintiff-respondents and for recovery of possession of the land.

[2] The three plaintiff-respondents are brothers of whom one is still a minor. Mortgage Suit No. 199 of 1934 was brought against the plaintiffs and their father to enforce a simple mortgage bond dated 7-12-1933 executed by the plaintiffs' father. The suit was dismissed against the present plaintiffs, who were then minors, for default on the failure of the present appellants, who were then plaintiffs, to get a guardian-ad-litem appointed for them on payment of the necessary fees. After the suit had been so dismissed as against the sons, a preliminary mortgage decree for sale was passed against the father and on 16-3-1936 an application was filed to make the decree absolute. That application was, however, struck off for failure to prove service of notice on 20-6-1936, and on 27-6-1936 a second application for making the decree absolute was filed, and after the issue of a certain notice and receipt of service return a final decree was passed on 27-7-1936. Before the application for final decree was made, the father of the plaintiff-respondents had died and one of the questions raised in this appeal relates to the effect of the proceedings for final decree which were taken against the present plaintiff-respondents, who were then minors. On 1-9-1936 an application for execution of the decree was filed and in the execution case started thereon the property was sold and purchased by the appellants on 21st December 1936. After delivery of possession was taken by the appellants as auction-purchasers, the respondents instituted the suit, out of which this appeal arises, for the reliefs indicated above. They denied that there was any debt owing by their father or any legal necessity for the mortgage. They alleged that the suit and the decree obtained against their father were fraudulent and collusive. They denied that their mother was their natural guardian after their father's death and denied that any notice was served on her or on them

in the proceedings for final decree or for execution.

[3] The plaintiff-respondents were all minors until after the execution sale which is now challenged. The Munsif in the trial Court held that consideration for the mortgage in question passed and that the mortgage was executed to pay off an antecedent debt of the plaintiffs, father which was due on a certain handnote. He found that the plaintiffs' mother was their natural guardian and that notice for the final decree and also notice under O. 21, R. 22, Civil P. C., in execution were served on her. He found that the mother did not appear in the suit or in the execution proceedings and that no other guardian ad litem was appointed for the minor plaintiffs either in the suit or in the execution proceedings and he found that there was no formal order appointing the mother as guardian ad litem. On these facts he took the view that the final decree could not be held to be a nullity by reason of the absence of any formal order appointing the mother as guardian ad litem, and held that the final decree was binding on the plaintiffs. He held that as notice under O. 21, R. 22 was served "on the plaintiffs and their mother" the sale in execution of the decree was binding on the plaintiffs.

[4] On appeal the learned Subordinate Judge in his judgment stated that the findings of the trial Court (i) that the mortgage bond was genuine and for consideration, (ii) that the plaintiffs were under the guardianship of their mother after the death of their father, and (iii) that notices of the final decree and the execution proceedings were served on the plaintiffs' mother, were not challenged before him. But he held that the suit was decreed against the plaintiffs without any guardian and they were not at all represented in the final decree proceedings and, therefore, they were not bound by the final decree or any proceedings in connection with it and that as against them the decree would be a nullity. He also held that the plaintiffs were not represented in the execution proceedings, that the Court had no jurisdiction to sell their property and that the sale, therefore, was a nullity.

[5] Now the final mortgage decree is not on the record. There is, therefore, nothing to show whether any person was described therein as the guardian ad litem of the present plaintiffs.

[6] This appeal first came before Shearer J. who considered that the case should be heard by a Divisional Bench because the point in issue was referred to a Divisional Bench by Dhavle J. in 1937, but the decision resulting from the reference was based largely on the facts of the particular case. The decision, to which he was referring, is 16 Pat. 632.[1] In the course of his order of reference Dhavle J. stated at page 637 of the report:

"About the guardians ad litem for the minors there is a great deal of conflict of opinion regarding the effect of absence of proof that the guardian had consented to his appointment. The question was elaborately considered by Das J. in 2 Pat. 335.[2] The learned Judge's views, however, have provoked comment in other quarters: *see* the decision of Rankin C. J. in 54 Cal. 450[3] and is not consistent with the views expressed in several reported decisions of this Court, 2 P. L. T. 617,[4] 3 P. L. T. 451[5] and 2 Pat. 7[6] (a decision to which Das J. was a party)."

Madan J. delivering the judgment, with which Courtney-Terrell C. J. agreed, stated at page 641:

"In suits Nos. 86 and 87 the decrees themselves have been found to be a nullity. In 3 P. L. T. 451[5] it has been held that in the case of minor defendants the Court must see not merely that a guardian is appointed, but that the guardian has consented to act. In this case the defendants were minors, and notices were served on them through their mothers as guardian. No appearance was made on their behalf, and there is no order of the Court appointing the mothers as their guardians or showing that the guardians consented to act on their behalf. In the circumstances the decrees were rightly found to be a nullity. The result is that I find no reason to interfere with the decision of the learned Subordinate Judge in regard to any of the suits, and I would therefore dismiss these appeals. The plaintiffs are entitled to be restored forthwith to possession of their holdings."

[7] The judgment of Das J., to which reference was made by Dhavle J. is that in 2 Pat. 335.[2] The substantial point made by him seems to be embodied in a passage at page 352 of the report:

"In my opinion, it is the record of the suit that must decide the question of jurisdiction, and where the record, on the face of it, shows that the minor was properly a party to the suit, the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity; though it may be set aside if it is shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties."

He relied in this connection on the decision of the Judicial Committee in 30 I. A. 182.[7]

[8] The case before the Privy Council was a case in which certain persons sued to avoid a decree and an auction sale. One of the grounds taken was that they were minors at the time and no guardian in the suit was duly appointed for them. While dealing with the facts their Lordships stated at p. 187:

"The alleged defects which remain are, first, that the present plaintiffs were not properly represented in that suit, that they were not properly served with summons in the suit; and that they were not properly served in the execution proceedings.

As to the first of these points, the mother of the present plaintiffs appears throughout the proceedings in the former suit as their guardian. It is impossible at this distance of time to ascertain positively whether an order appointing her guardian ad litem was ever drawn up; but the Subordinate Judge in the present

case assumed that there had been none and he was probably right. An examination, however, of such proceedings in that suit as are forthcoming shews that the Court admitted the plaint in which the mother was described as guardian; that in its decree it so described here; and that similar language was used in the execution proceedings."

Later at p. 189 their Lordships held that the then plaintiffs were effectively represented in the suit by their mother, and with the sanction of the Court. At p. 185 in their Lordships' judgment it was stated that the decree was an ex parte one, and in the statement of facts at p. 183 it was stated that among the findings of the first Court there was a finding that "the minors were not prejudiced by the widow's silence." The widow was the mother of the minors. It appears, therefore, clear that she did not make any appearance in the suit on behalf of the minors though her name appeared on the record as guardian ad litem.

[9] The case in 3 P. L. T. 451[5] was a case in which no notice or summons was served on the natural guardian.

[10] In the present case as the decree is not on the record there is nothing to show that the name of any person appeared in the record of the suit as guardian ad litem recognised by the Court. It is true that in the notice for final decree the present plaintiffs were described as under the guardianship of their mother, but such notices are filled up by the parties, and under O. 32, R. 2, sub-r. (4) no appointment of a guardian ad litem could be made by the Court except upon notice to the mother who was the natural guardian. The Court could, therefore, hardly refuse to issue the notice in the first instance to the mother as natural guardian and, therefore, in my opinion the issue of this notice by the Court did not amount to any sanction by the Court to authorise the mother to act as guardian ad litem or a recognition of the mother as guardian ad litem.

[11] In my opinion in this case it is not established that there was any person on the record of the suit at the time of the final decree as guardian ad litem of the present plaintiffs and no person was proved to have been recognised as such by the Court quite apart from the question whether there was any formal order of appointment. In this view of the matter I am of opinion that on the rulings above cited there was no decree against the present plaintiffs at all and they were never in any real sense parties to that decree.

[12] If, however, this case depended entirely on the question whether the decree might bind the minors, I think it might be necessary to examine a little more closely the question whether the mere notice to the mother might not in the circumstances of this case be sufficient to achieve the result that they were effectively represented in the suit because on the finding that the mortgage was executed for payment of an antecedent debt of the father there was no possible defence which could successfully be raised on behalf of the present plaintiffs. In fact it has been held by the Allahabad High Court in A. I. R. 1929 ALL. 252[8] that it would not have been open to the present plaintiffs in the proceedings for final decree to challenge the preliminary decree. The case before the Allahabad High Court was another case in which the plaintiffs' father died after a preliminary decree had been obtained against him alone on the basis of a mortgage. On the father's death his sons as his legal representatives claimed in the proceedings for final decree to challenge the validity of the mortgage on the basis that it was not executed for legal necessity. The Court held that they could not raise the question at that stage because the Court in proceedings for final decree could not go behind the preliminary decree.

[13] The present case does not, however, entirely depend on the question how far the mortgage decree might be effective against the present plaintiffs. There is the further question regarding sale. It has been held by this Court that if no notice is issued under O. 21, R. 22, Civil P. C., the sale held in the execution proceedings is without jurisdiction and void: *vide* the decision of the Full Bench in 23 Pat. 538.[9] In this case a notice under O. 21, R. 22 was issued and served on the mother according to the findings of the lower Courts. Had a guardian ad litem been appointed for the plaintiffs in the suit, then under O. 32, R. 3, sub-r. (5) his appointment would have continued as valid for the proceedings in execution, but I do not think the same principle can possibly be applied when the most that can be said against the present plaintiffs is that they were effectively represented in the suit, although no guardian ad litem was appointed on their behalf. Again I do not think that mere issue of the notice under O. 21, R. 22 in the name of the mother could amount to an appointment or even a recognition of her as guardian ad litem of the present plaintiffs in the execution proceedings. In my opinion the issue of the notice under O. 21, R. 22 had no effect at all unless it was issued in the name of a person who had either been appointed or recognised by the Court as guardian ad litem, and, therefore, in the present case the position, so far as the present plaintiffs are concerned, is exactly the same as if no notice had been issued under O. 21, R. 22 at all.

[14] For these reasons I would dismiss this appeal with costs.

[15] **Bennett J.** — A minor is not bound by any proceedings taken against him during his minority unless he was a party thereto. Whether a minor was or was not a party to any such proceedings depends, in my opinion, upon whether or not he was effectively represented therein. The judgment of the Judicial Committee in 30 I. A. 182[7] makes it clear that the failure to comply with the letter of O. 32, Civil P. C., will not prevent the minor being bound by the decision in any proceedings, if, in fact, in the circumstances of the particular case, he can properly be said to have been effectively represented therein. Order 32, Civil P. C. does not deal with substantive rights and only provides a statutory means of securing the representation of a minor in civil proceedings. There is nothing in that order to indicate that provided that the letter of the order is followed, the minor will be bound by the decision, although in fact he was never effectively represented in the proceedings. Nor, in my opinion, can such an intention, which is against the dictates of justice, equity and good conscience, in that it would open the door to undetectable fraud whereby many minors would be deprived of their rights and inheritance, be attributed to the Legislature.

[16] When, therefore, any question arises as to whether a person is bound by any decree or order of a civil Court passed during his minority, the proper and only test, in my opinion, is whether he was so effectively represented in the proceedings leading to the decree or order in question as in justice, equity and good conscience to justify, in the circumstances of the particular case, the conclusion that he was in fact a party to those proceedings. All such questions as to whether a guardian ad litem was duly appointed or recognised by the Court either under the provisions of O. 32 or otherwise or whether the guardian so appointed had consented to act or whether some notice required by O. 32, or, subject thereto, by any other provision of law or whether the guardian actually appeared in the proceedings or whether the guardian took the proper and necessary steps to safeguard the interests of the minor, are, in my opinion, entirely subordinate to the test of effective representation and no one of them constitutes in the circumstances of every case a complete answer to that test. Where a guardian ad litem has been duly appointed by the Court and has appeared in the proceedings, the prima facie inference is that the minor was effectively represented and the onus will no doubt be heavily upon him, when he comes of age, to show that nevertheless he was not so effectively represented. Where there has been no due appointment of and no appearance by a guardian ad litem, the *prima facie* inference is that the minor was not effectively represented in the proceedings and the onus lies heavily upon the person seeking to rely upon the decree or order to show that the minor was nevertheless effectively represented therein. In between these two extremes the onus will vary according to the particular circumstances of the case.

[17] In the circumstances of this case, which have been set out by my learned brother, I am of opinion that the plaintiffs, who were then minors, were not effectively represented either in M. S. No. 199 of 1934 or in the subsequent execution proceedings and therefore that they were not parties to and, so, are not bound by either of these proceedings.

[18] I find myself, very respectfully, unable to follow the decision in A. I. R. 1929 ALL. 252[8] referred to by my learned brother, in so far as that decision applies to the facts of this case. The plaintiffs in M. S. No. 199 of 1934, the present defendants, chose to make the present plaintiffs parties to that suit and the suit was later dismissed against them for default of appointment of a guardian ad litem. It follows that the preliminary decree was against their father in his personal capacity only. In those circumstances, it appears to me idle to contend that the present plaintiffs, except solely as the legal representatives of the personal estate of their father, would have been bound by the preliminary decree in that suit. It seems to me that if the present defendants had later applied in that suit to add the present plaintiffs as defendants thereto in any other capacity, the present plaintiffs could successfully have resisted that application on the grounds that the suit against them had already been dismissed and that the interest of their father in the mortgaged property ceased on his death. It therefore seems proper to me to affirm the decision of the learned Subordinate Judge both as to the decree in M. S. No. 199 of 1934 and as to the subsequent execution proceedings and sale.

[19] I, therefore, agree that the appeal should be dismissed with costs.

S.C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 285** *[C. N. 101.]*

DAS J.

*Jodhan Sahu—Petitioner* v. *Mt. Kulwanti Kuer—Opposite Party.*

Criminal Revn. Nos. 424 and 716 of 1947, Decided on 10th October 1947, against order of Sessions Judge, Gaya, D/- 15th May 1947.

**(a) Criminal P. C. (1898), S. 488 (5) — Adultery —Proof of — Direct evidence of adultery may not**

be possible by the very nature of the offence — But there must be some evidence showing opportunity and desire to commit offence or access by man to woman — Mere hole and corner tattle or bazar-gossip does not prove adultery. [Para 5]

Annotation : ('46-Com.) Cr. P. C., S. 488, N. 22.

(b) Criminal P. C. (1898), Ss. 439 and 488— New plea in revision—Application by husband for vacating order of maintenance on ground of wife's adultery under S. 488 (5) — Point that resumption of cohabitation rendered maintenance order ineffective never pleaded nor evidence given—Point held could not be raised for first time in revision. [Para 7]

Annotation : ('46-Com.) Cr. P. C., S. 439, N. 44.

*Cases referred* :—

1. ('42) 29 A. I. R. 1942 Mad. 1 : I. L. R. (1942) Mad. 24 : 200 I. C. 794, V. Venkayya v. V. Raghavamma.
2. ('45) 1945-2 M. L. J. 408 : 33 A. I. R. 1946 Mad. 222, Munuswami Pillai v. Doraikannu Ammal.
3. ('47) 1947-1 M. L. J. 34 : 34 A.I.R. 1947 Mad. 423 : 229 I. C. 176 : 49 Cr. L. J. 302, Kuppuswami Padayachi v. Jagadambal.

*Ray Parasnath and Baldeva Sahay*—for Petitioner.

*Nandlal Untwalia*—for Opposite Party.

**Order.**—These two petitions in revision have been heard together. One of the petitions is by the husband and the other by the wife. The point raised by these petitions is a very short point, namely, if Mt. Kulwanti Kuer, the wife, is living in adultery so as to disentitle her to maintenance from the husband, Jodhan Sahu. This, however, is one of those cases in which a long story has to be told in order to appreciate and decide a short point. I must, therefore, tell the long story first before I proceed to decide the point raised.

[2] The story is as follows: Mt. Kulwanti Kuer was originally married to the elder brother of Jodhan Sahu. After the death of her former husband, she was married to Jodhan Sahu. This is not in dispute. By Jodhan Sahu she had at least two children before 1927, namely, a girl called Shanti Devi and a boy Lattu, who subsequently died. In 1927, Mt. Kulwanti Kuer applied for and obtained an order of maintenance under the provisions of S. 488, Criminal P. C. The order in her favour was passed on 31st May 1927, and was to the effect that Jodhan Sahu should pay her a sum of Rs. 15 per month and $5\frac{1}{4}$ seers of rice per day. It appears that Jodhan Sahu had also another wife, and Jodhan lived with that other wife and her children in one house whereas Mt. Kulwanti lived with her children in an adjacent house. Mt. Kulwanti's case was that Jodhan agreed to maintain her and continued to maintain her till about 1944 when fresh differences arose between the parties. On 15th February 1945, Mt. Kulwanti Kuer made an application for the issue of a distress warrant for arrears of maintenance for about 11 months from February 1944 to January 1945. This application was objected to by the husband on various grounds, with which we are not at present concerned, by a petition dated 3rd March 1945. On 12th April 1945, Mt. Kulwanti Kuer filed another application to the effect that the maintenance allowance should be enhanced because another son of the name of Bigan had been born to her by Jodhan in the year 1936 and she had to maintain that child as well. On that very date, that is 12th April 1945, Mr. Robertson, the then Sub-divisional Magistrate, passed an order in favour of Mt. Kulwanti Kuer allowing her maintenance for the period in question but reducing the rate by one-third of the original order of 31st May 1926. This order of 12th April 1945, may be conveniently described as Mr. Robertson's order in favour of the wife. In the operative part of Mr. Robertson's order, there was some mistake of calculation, and this was corrected on 5th May 1945, by Mr. Sarkar, the successor-in-office of Mr. Robertson. Against Mr. Robertson's order as modified by Mr. Sarkar, there was an application in revision to this Court by the husband. The application was disposed of by by Beevor J., and this Court refused to interfere with Mr. Robertson's order as modified by Mr. Sarkar.

[3] Then on 23rd April 1945, the husband made an application with two prayers (a) for vacating the order of maintenance under sub-s. (5) of S. 488, Criminal P. C., on the ground that the wife was living in adultery, and (b) for a reduction of the rate of maintenance on various grounds. In this application of the husband an objection was made by the wife. On 29th May 1945, the then Sub-divisional Magistrate made an order reducing the rate of maintenance to half of the rate fixed by the original order of 31st May 1927. Against this order of the learned Sub-divisional Magistrate reducing the maintenance to half, there were an application in revision and also a reference, as both the husband and the wife were aggrieved by this order. The application in revision and the reference were disposed of by Imam J., who by his order dated 22nd January 1946, set aside the order of the learned Sub-divisional Magistrate reducing the maintenance to half and remanded the case for a fresh hearing after the parties had an opportunity of adducing evidence on the question of the alleged adultery of the wife. Then the wife filed a second application in which it was alleged that part of the maintenance allowed by the first application was still in arrear and a prayer was made by issuing a distress warrant for the arrears as also maintenance for the period from February 1945 to March 1946. This second application was disposed of by the learned Sub-divisional Magistrate on 13th August 1946. In view of the order of Imam J., the learned Sub-divi-

sional Magistrate allowed maintenance at the rate of the original order of 31st May 1927. The husband again came up to this Court, and, on 3rd February 1947 my Lord the Chief Justice disposed of the application by holding, on a proper construction of Imam J.'s order, that the rate of maintenance had been revised by Mr. Robertson's order and the wife was entitled to maintenance only at that rate.

[4] Then on 27th February 1947, the wife made a third application in which it was alleged that part of the maintenance for the previous periods was still in arrear and that maintenance should be allowed for a further period from April 1946 to February 1947. This third application has been disposed of by the learned Magistrate by his order dated 8-5-1947. The learned Magistrate has allowed the wife's application and has directed that the rate of maintenance should now be calculated for all the periods in accordance with Mr. Robertson's order, as modified by Mr. Sarkar. The learned Magistrate has directed the issue of a distress warrant for the amount as found on such calculation. This order of the learned Magistrate dated 8-5-1947 was passed when the case remanded by Imam J. on the question of the adultery of the wife was still pending consideration. This remanded case was disposed of by the learned Honorary Magistrate exercising first class powers at Gaya on 9-6-1947. The learned Honorary Magistrate held that the wife was living in adultery and, therefore, the order for maintenance passed on 31-5-1927 should be vacated. The learned Honorary Magistrate has vacated the order for maintenance. It is against this order of the learned Honorary Magistrate that the petition of the wife is directed, and Criminal Revision No. 716 of 1947 relates to the petition of the wife. The petition of the husband arises out of the order of the learned Sub-divisional Magistrate, Gaya, dated 8-5-1947, by which the third application for maintenance has been disposed of. It appears that the husband moved the Sessions Judge in revision and wanted a stay of the execution of the order. The learned Sessions Judge refused to stay execution. Against that order refusing to stay execution the husband has come up in revision to this Court in case No. 424 of 1947. This Court also refused to stay further proceedings while admitting the application.

[5] It will be convenient to take up the petition of the wife first. As I have stated above, the short question for determination in connection with the wife's petition is if the finding of the learned Honorary Magistrate that the wife has been living in adultery is a correct finding. Learned counsel for the petitioning wife has contended before me that the finding and order of the learned Honorary Magistrate are vitiated on three grounds: (1) the learned Honorary Magistrate has misdirected himself on the question of the nature of proof required for proving adultery; (2) the learned Honorary Magistrate has failed to take into consideration an important document and certain important facts and circumstances arising out of the evidence in the record; and (3) the learned Honorary Magistrate has committed serious errors of record with regard to the evidence given by the witnesses. In view of the grounds taken by learned counsel for the petitioning wife, I have permitted counsel for both parties to place the entire evidence before me. Having gone through the entire evidence in the record, I am satisfied that the learned Honorary Magistrate has completely misdirected himself as to the kind of evidence which is required to prove adultery in a case of this nature. Except the husband himself, all the other witnesses who gave evidence in support of the alleged adultery spoke merely of hearsay knowledge. Not one of them gave any definite evidence from which adultery can be reasonably inferred. Learned counsel for the husband has contended before me that direct evidence of adultery may not be possible by the very nature of the offence. That is so, but there must be some evidence showing opportunity and desire to commit the offence or access by the man to the woman, etc. Mere hole and corner tattle or bazar gossip does not prove adultery. In this case the evidence on which the learned Honorary Magistrate has relied is evidence of that character, and, if the learned Honorary Magistrate had correctly appreciated the nature of proof which is required in order to establish adultery, he could not have come to the finding to which he came on the question of adultery. [After considering the evidence his Lordship proceeded.]

[6] The learned Honorary Magistrate has clearly come to an erroneous finding on the question of the alleged adultery of the wife. In my opinion no such adultery has been proved, and the order of the learned Magistrate vacating the order of maintenance on the ground of the alleged adultery of the wife must be set aside.

[7] I now turn to the application of the husband. So far as that application was confined to the question of stay only, it has become infructuous. No stay was granted by this Court, and now that the order of the learned Honorary Magistrate is being set aside by me, there is no question of any stay as regards the order passed by the learned Sub-divisional Magistrate directing the issue of a distress warrant for the realisation of the arrear maintenance. Learned counsel for the husband, however, has raised an altogether new point before me. He has contended

that if Bigan is a son of Jodhan, then it follows that the wife had resumed cohabitation with the husband, and such resumption would make the original order for maintenance ineffective; if after the resumption of such cohabitation the husband has again neglected to maintain the wife, it would be necessary for the wife to make a fresh application for maintenance and obtain a fresh order under S. 488, Criminal P. C., the original order for maintenance having become ineffective and inoperative by reason of the resumption of cohabitation. Learned counsel for the husband has placed reliance on three Madras decisions, A. I. R. 1942 Mad. 1,[1] (1945) 2 M. L. J. 408[2] and (1947) 1 M. L. J. 34.[3] It is not necessary for me to consider those decisions in any great detail for the simple reason that this is a new case which learned counsel for the husband is seeking to make out in argument. It was not the case of any of the parties in neither of the Courts below. Even in the petition which the husband has filed to this Court no such case has been made out. The case of the wife has all along been that she has been living separate from Jodhan in a separate house and Jodhan had maintained her till 1944 when, as a result of fresh differences, the husband neglected to maintain her and her children. In the case reported in A.I.R. 1942 Mad. 1,[1] the wife returned to the husband and they lived together for several years. The admitted position was that they lived together for over five years and during that period the wife bore a son to the husband. In the case reported in 1947-1 M. L. J. 34[3] the wife rejoined the husband and lived together for about six months. In the case reported in 1945-2 M.L.J. 408[2] the wife was brought to the house of the husband by a ruse and it was held that the principle laid down in the case reported in A.I.R. 1942 Mad. 1,[1] did not apply. In the case before me, it was nowhere the case of the wife that she had rejoined her husband or was living with him; nor is this the case of the husband in the application dated 23-4-1945. I do not, therefore, think that the husband can be allowed to make out an altogether new case in revision. Under S. 489, Criminal P. C., the Magistrate may cancel or vary an order for maintenance on proof of a change or alteration in the circumstances. The only ground on which the husband wanted the order of maintenance to be vacated was the ground of adultery under S. 488 (5), Criminal P. C. That ground having failed, I do not think it is open to the husband to make out an altogether new case which was never pleaded and on which no evidence was given by the parties.

[8] Then there is another difficulty in the way of the husband. The previous orders for the realisation of arrears of maintenance passed by the learned Sub-divisional Magistrate had been challenged right up to this Court. Those orders have now become final, and I fail to see how those orders can now be challenged on the new ground that the resumption of cohabitation had made the original order of maintenance passed in 1927 inoperative and ineffective. Such a ground could and should have been taken by the husband in answer to the applications which the wife had filed. The husband had not taken that objection to the various applications which the wife had made, and on which Courts of competent jurisdiction had passed orders in favour of the wife. I do not think the husband can be allowed to go behind those orders by raising this new ground which was not pleaded before. Without, therefore, deciding whether this new ground has any substance or not, I may point out a material difference that exists between the facts of the two Madras decisions and the present case. In both the Madras decisions where the effect of resumption of cohabitation was held to make the original order of maintenance ineffective, the wife returned to the husband and lived with him for a considerable time. In the case before me there is no evidence that the wife returned to the husband and lived with him. On the contrary, the case of the wife all along was that she had been living separate, though the husband has had access to her on some occasions. It is doubtful if in circumstances like the present, in which the wife is living separate from the husband, it can be held as a matter of law that the birth of a child will by itself render the previous order of maintenance ineffective or inoperative. I fail to see any good reason why in circumstances like those in the present case, the wife should be driven to file a fresh application for maintenance.

[9] For the reasons given above, I allow the application of the wife and set aside the order of the learned Honorary Magistrate dated 9-6-1947. The application of the husband is dismissed.

G.N. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 288** *[C. N. 102.]*

SHEARER AND REUBEN JJ.

*Balgajan Rai and others — Appellants* **v.** *Sukhu Rai and others — Respondents.*

A. F. A. D. No. 953 of 1943, Decided on 11-3 1947, from decision of Sub-Judge, Arrah, D/- 23-6-1943.

**Civil P. C. (1908), O. 22, Rr. 4 and 11 — One of several respondents dying during pendency of appeal—Others fully representing estate of deceased —Legal representatives of deceased not brought on record—Appeal does not abate.**

It is well settled that when a party to a suit dies leaving a number of persons as his legal representatives, it is desirable that all such persons should be substituted in his place. It is, however, equally well settled that if

through some oversight or other, some of such persons are brought on the record and others are not; the estate is fully represented by those who are; those who are not may subsequently apply to be brought on the record but there is no abatement.

Thus where during the pendency of appeal one of the several respondents dies leaving his widow and minor sons as his heirs, but no steps are taken to bring them on the record and it is found that the other respondents fully represented the estate of the deceased, the appeal does not abate. If in consequence of the death of the deceased respondents, the remaining respondents or any of them are of opinion that they no longer represent his estate and that in order to secure full justice it is necessary to bring on the record his widow and minor sons they can and ought to intimate this to the Court. It would amount to putting a premium on fraud to hold that they are entitled to conceal certain facts from the Court and then, on the basis of these facts, to assert that the appeal has abated : 16 All. 211, *Disting.*; 17 A.I.R. 1930 Sind 147, *Expl.*; 12 A. I. R. 1925 Pat 551; 20 A. I. R. 1933 Cal. 325 and 26 Mad. 224, *Rel. on.* [Para 1]

**Annotation** : ('44-Com.) Civil P. C., O. 22, R. 4 Nts. 2 & 9.

*Cases referred : —*

1. ('94) 16 All. 211, Ghamandi Lal v. Amir Begam.
2. ('25) 4 Pat. 320 : 12 A. I. R. 1925 Pat. 551 : 89 I. C. 230, Shib Dutta Singh v. Karim Bakhsh.
3. ('30) 17 A.I.R. 1930 Sind 147 : 124 I. C. 377, Sahijram v. Bhambhomal.
4. ('32) 36 C. W. N. 1138 : 20 A. I. R. 1933 Cal. 325 : 60 Cal. 87 : 143 I. C. 315, Umesh Chandra v. Hemanga Chandra.
5. ('03) 26 Mad. 224, Meenatchi Achi v. Anantha-narayana Ayyar.

*D. N. Varma and Kanhaiyaji* — for Appellants.

*A. B. N. Sinha* — for Respondents.

**Shearer J.** — This second appeal arises out of a suit instituted under O. 21, R. 63, Civil P. C. A decree for money was obtained against the three sons of one Bechu Rai, and in execution of that decree certain property was attached. Bechu Rai died in or about 1917, and his father, Lakhi Rai, who survived him, then executed a deed or deeds of gift, conveying certain property to two of his three sons. This deed, or these deeds, of gift apparently contained a recital that the two sons were illegitimate. The third, and youngest son Sukhu Rai, was then a mere infant and no deed of gift in his favour was executed. One Chhatrapati Rai put in an objection under O. 21, R. 58, Civil P. C., asserting that Sukhu Rai was also an illegitimate son of Bechu Rai and that, on the death of Lakhi Rai some of the property which had been attached devolved on himself and some other persons. The objection was dismissed and Chhatrapati Rai then instituted a suit which was decreed. During the pendency of the suit, Chhatrapati Rai died and one Ram Chandra Rai and ten other persons were substituted as his legal representatives. The suit was decreed, but on appeal the decree was set aside, the learned Subordinate Judge being of opinion that Sukhu Rai was a legitimate son of Bechu Rai. During the pendency of the appeal Ramchandra Rai died, leaving a widow and some minor sons. No steps were taken by the appellant, Sukhu Rai, to bring these persons on the record, and it is now contended that in consequence the appeal abated. Were the widow and the minor sons of Ramchandra Rai the legal representatives of the plaintiff in the suit Chhatrapati Rai ? No authority on the point was cited, and I have myself been unable to discover any except 16 ALL. 211[1] in which, however, the question that arose was a very different one. Assuming, however, that on the death of Lakhi Rai certain property of his devolved on Chhatrapati Rai, and that, on the death of Chhatrapati Rai some portion of that property devolved on Ramchandra Rai, and that, on Ramchandra Rai's death, it devolved in turn on his widow and minor sons, then, I am inclined to think that the widow and the minor sons could claim to be the legal representatives of Chhatrapati Rai, and, if they had asked to be brought on the record when Ramchandra Rai died, the application would have had to be allowed. It does not, however, by any means follow that the omission to bring them on the record necessarily worked an abatement of the appeal. It is well settled that when a party to a suit dies, leaving a number of persons as his legal representatives, it is desirable that all such persons should be substituted in his place. It is, however, equally well settled that, if through some oversight or other, some of such persons are brought on the record and others are not, the estate is fully represented by those who are; those who are not may subsequently apply to be brought on the record, but there is no abatement: 4 Pat. 320.[2] If, therefore, Ramchandra Rai had never been substituted in place of Chhatrapati Rai, the other persons who were substituted could have maintained the suit and the decree would have been binding against Ramchandra Rai. Can it make any difference that he was brought on the record and that, when he died, his widow and minor sons were not ? If Ramchandra Rai had predeceased Chhatrapati Rai, then the omission to substitute his widow and minor sons as the legal representatives of Chhatrapati Rai would have been quite immaterial. The Chief Court of Sind, differing from this Court and most of the other High Courts in India, have apparently taken the view that, when a party dies leaving several legal representatives, all these legal representatives must be substituted in his place. It is to be observed that the Chief Court has also held that, when a defendant dies and some of his legal representatives are brought on the record, the other defendants are estopped from asserting at a later stage that other persons also should have been substituted in his place; A.I.R. 1930 Sind

147.[3] The Calcutta High Court similarly took the view that, in a mortgage suit in which a certain person had been substituted as the legal representative of a deceased defendant, the other defendants were estopped from contending on appeal that the deceased had left other legal representatives who should also have been substituted in his place; 36 C. W. N. 1138.[4] The Calcutta High Court followed a decision of the Madras High Court in which it had been held that the defendants were estopped from contending that a person who had been substituted as the legal representative of a deceased plaintiff did not fully represent his estate; 26 Mad. 224.[5] If the principle of equitable estoppel can be applied in such cases as these, it seems to me that *a fortiori* it can be applied in the present case. The appellants were permitted by the trial Court to carry on the suit on the understanding that they and Ram Chandra Rai fully represented the estate of the deceased plaintiff Chhatrapati Rai. If in consequence of the death of Ramchandra Rai, they, or any of them, were of opinion that they no longer fully represented his estate, and that, in order to secure such full representation it was necessary to bring on the record the widow and the minor sons of Ramchandra Rai, they could and ought to have intimated this to the Court. Three of them, it may be observed, are the brothers of Ramchandra Rai, and apparently they and Ramchandra Rai were all members of one and the same joint family. It would amount to putting a premium on fraud to hold that they were entitled to conceal certain facts from the Court, and then, on the basis of these facts, to assert that there had been an abatement of the appeal. In my opinion, there was not and could not be any abatement, as, in spite of the death of Ramchandra Rai, the other respondents fully represented the estate of the deceased plaintiff, Chhatrapati Rai. For these reasons, I would dismiss the appeal with costs.

**Reuben J.** — I agree.

R G.D. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 290 *[C. N. 103.]*

IMAM J.

*Dwarka Prasad Marwari (accused)* —*Petitioner* v. *Emperor.*

Criminal Revn. No. 1440 of 1946, Decided on 20-1-1947, from order of Addl. Dist. Magistrate, Santal Parganas.

(a) Cotton Cloth and Yarn Control Order (1943), Cl. 23 (before its amendment in 1944) — Sanction of Provincial Government— Letter of cloth controller.

When sanction is necessary for starting criminal prosecution against a person, absence of such sanction is fatal to the criminal proceedings: 32 A. I. R. 1945 F. C. 16, *Rel. on.* [Para 2]

*Held*, that a letter from the cloth controller (before the amendment of Cl. 23 in 1944) sanctioning a prosecution was not an order by the Provincial Government sanctioning prosecution. [Para 1]

(b) Cotton Cloth and Yarn (Control) Order (1943), Cls. 10 and 13 (c) — Contravention of Cl. 13 (c) — Notification under Cl. 10 not on record — Conviction is not legal.

Where the prosecution case is that the accused has contravened the provisions of Cl. 13 (c) of the Order but the notification made by the Textile Comissioner under Cl. 10 is not brought on record, then in the absence of such notification there being no proof that there has been contravention of the provisions of Cl. 13 (c) the accused cannot be convicted : 32 A. I. R. 1945 Pat. 210, *Ref.* [Para 3]

(c) Criminal P. C. (1898), S. 342 — Technical defence.

The accused is entitled to put up a technical defence and to take advantage of every laches on the part of the prosecution. [Para 4]

Annotation: ('45-Com) Cr. P.C.S. 342 N. 29 pt. 2

*Cases referred*:—

1. ('45) 32 A.I.R. 1945 F.C. 16: I.L.R. 1945 Kar. F.C. 21 : 1945 F. C. R. 93 : 218 I. C. 449 : 46 Cr.L.J. 510 (F. C.), Basdeo Agarwala v. Emperor.
2. ('45) 32 A. I. R. 1945 Pat. 210 : 24 Pat. 143 : 219 I. C. 148 : 46 Cr. L. J. 538, Ram Prasad v. Emperor.

*S. R. Ghosal and K. C. Sanyal* — for Petitioner.

*Ramanand Sinha for Government Advocate* — for the Crown.

**Order.** — This is an application against the order of the Additional District Magistrate of the Santal Pargannas remanding a case for retrial. The petitioner was convicted under R. 81 (4) of the Defence of India Rules and sentenced to undergo rigorous imprisonment for six months. It is said that he was in possession of 22 pieces of cloth which were unstamped and untexmarked mill made cloth and had thus contravened the provisions of C. 13 (c) of the Cotton Cloth and Yarn Control Order, 1943. The petitioner appealed against his conviction and the lower appellate Court remanded the case for retrial mainly on two grounds. The first ground was that under Cl. 23 of the Cotton Cloth and Yarn Control Order, 1943, sanction of the Provincial Government was necessary before a prosecution could be instituted against the petitioner. The Court of appeal thought that such a sanction had perhaps been obtained as there was on the record a copy of a letter from the Cloth Controller sanctioning the prosecution, but that the letter had not been exhibited at the trial. The petitioner had objected at the trial and his objection had been overruled by the Magistrate stating that the Court could take judicial notice of the paper conveying the sanction and the Subdivisional Officer's endorsement on the order-sheet and formal proof of these was not absolutely necessary. The Court of appeal, therefore, thought that the case must go back in order to bring on to the record by way of formal proof the sanction for the prose-

cution of the petitioner ordered by the Provincial Government. The other ground on which the Court of appeal thought it was necessary to remand the case was that the Notification made by the Textile Commissioner had not been brought on to the record and therefore, it was impossible to say that the possession of the 22 pieces of cloth was in contravention of C. 13 (c) of the Cotton Cloth and Yarn Control Order, 1943. It was objected on behalf of the petitioner that the judgment of the lower appellate Court merely disclosed that perhaps there exists a letter from the Cloth Controller sanctioning the prosecution, but this is not the same thing as the Provincial Government sanctioning the prosecution. There appears to have been an amendment to clause 23 of the Order by which the Provincial Government can delegate their power to certain officers to sanction prosecution, but this Notification was not made until 25th November 1944, whereas the Cloth Controller's letter is of 13th June 1944, and the proceedings were instituted against the petitioners on 28th October 1944. It seems that even if there is the Cloth Controller's letter in existence somewhere, it can hardly be said that his order sanctioning the prosecution is the order of the Provincial Government—a copy of it on the record, which the Additional District Magistrate received and on which he passed orders, does not purport to show that the prosecution was being sanctioned by the Provincial Government.

[2] Having regard to the decision of the Federal Court in (A. I. R. 1945 F. C. 16[1]) the absence of a sanction is fatal to the institution of criminal proceedings. When a sanction is obtained it will be open to the prosecution to proceed *ab initio*.

[3] As to the other ground with reference to clause 13 of the Order, as to whether there has been a contravention of clause 13 (c) of the Order, the Notification of the Textile Commissioner should have been on the record and it seems to me that the failure of the prosecution to bring it on to the record clearly indicates that they gave no evidence with reference to it and, therefore, in the absence of such evidence there was no proof that there had been a contravention of the provisions of clause 13 (c) of the Order and that, consequently, there could be no question of clause 13 (c) becoming applicable. I would refer to the following observations made by this Court in (A. I. R. 1945 Pat. 210).[2]

"although this Court has on many occasions drawn attention to the necessity of proving in a legal manner orders on which the prosecution relies for proof of the commission of an offence, very little attention appears to be paid to the matter by the persons responsible for conducting prosecutions."

It seems to me that if the prosecution will not take the trouble to do their duty, they cannot but be blamed if the accused escapes from their hands on technical grounds.

[4] It seems to me in the present case that, as the record stood, there should have been no conviction of the petitioner and it is a matter of prejudice to him if the case were to be remanded so as to fill up the gaps in order to bring about a conviction. The accused is entitled to put up a technical defence and to take advantage of every laches on the part of the prosecution. I would, accordingly, allow the application, set aside the order of remand passed by the Court below as also the conviction and sentence passed upon the petitioner by the trial Court.

N.S.D. *Application allowed.*

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**A. I. R. (35) 1948 Patna 291** *[C. N. 104.]*

AGARWALA C. J. AND NARAYAN J.

*Emperor* v. *Sheonath Ram and another* — *Accused.*

Death Reference No. 18 of 1947, Decided on 17-2-1948, made by Sessions Judge, Saran, D/- 22-12-1947.

(a) Penal Code (1860), S. 34—Common intention —Mode of attack indicating accused were animated with intention of killing deceased—S. 34 applies.

Where the mode of the attack with guns made by the two accused against the deceased indicated that the accused were animated with the intention of killing the deceased, S. 34 applies : 32 A. I. R. 1945 P. C. 118, *Disting.*; 34 A. I. R. 1947 Mad. 239, *Ref.* [Para 11]

(b) Criminal P. C. (1898), S. 342—Examination of accused insufficient—Trial is not vitiated.

Even if the examination of the accused under S. 342 be insufficient, the trial is not vitiated: 12 A.I.R. 1925 Cal. 361, *Ref.* [Para 12]

Annotation:—('46) Cr. P. C., S. 342, Ns. 15 and 35.

(c) Criminal P. C. (1898), S. 289 (4)—Meaning of.

Clause (4) of S. 289 does not mean anything else except this that if the accused calls no witness he or his pleader is to make his final address to the Court.

It does not mean that the accused should be examined again. [Para 13]

Annotation : — ('46-Com.) Cr. P. C., S. 289, N. 9, Pt. 9.

(d) Penal Code (1860), S. 302—Sentence—Murder by police constables—No extenuating circumstance —Capital punishment is only appropriate sentence. [Para 14]

*Cases referred* :—

1. ('45) 72 I.A. 148 : 32 A.I.R. 1945 P. C. 118 : I.L.R. (1945) Lah. 367 : I.L.R. (1945) Kar. (P. C.) 210 : 219 I. C. 467 : 46 Cr. L. J. 689 (P. C.), Mabbub Shah v. Emperor.
2. ('47)I.L.R. (1947) Mad. 224 : 34 A.I.R. 1947 Mad. 239 : 228 I. C. 178 : 48 Cr. L. J. 112, Public Prosecutor v. Chitikina Subbamma.
3. ('25) 52 Cal. 522 : 12 A.I.R. 1925 Cal. 361 : 85 I.C. 919 : 26 Cr. L. J. 631, Emperor v. Alimuddin Naskar.

*Government Advocate*—for the reference.

*D. Lall and K. C. Sanyal*—against the reference.

**Narayan J.** — This is a reference for the confirmation of the sentence of death passed on Sheonath Ram, Havildar, and Rambilas Rai, constable, for the murder of one Nageshwar Kalwar. The condemned persons have preferred an appeal, and the appeal and the reference have been heard together.

[2] There is a police outpost in Mahalla Katahri Bagh of the Chapra town. It was established after the last communal disturbances. The appellant 1 Sheonath Ram was the Havildar in charge of the outpost, and appellant 2 Rambilas was a constable posted there. Besides Rambilas Rai, the Havildar had nine other constables, under him and this police outpost had been given ten rifles of 303 bore and 200 rounds of ammunition. There is a Girls' School close to the outpost, and girls of respectable families were the students of this institution. The mistresses of the school used to pass by a road which is just by the side of the outpost.

[3] On 4-9-1947, the deceased Nageshwar Kalwar and one Babban Prasad appeared before the President of the Town Congress Committee with a petition, which was signed by seven persons, and in this petition it had been alleged that the policemen posted at the outpost had been behaving indecently with the girls and the mistresses, and that they had threatened those who had protested against their conduct.

[4] On 9-9-1947, these two appellants appeared before the Vice-President of the Thana Congress Committee with Mt. Bhagwania, a woman of ill-repute, and told him that the deceased had asked this woman to complain to the police officers that she had been molested by the Havildar and constables. The same day in the evening the officer-in-charge of the Chapra police station and the Town Inspector of Police Mr. Masih, while they were out to supervise the work of the police outpost, happened to meet the deceased Nageshwar, who complained to them that Bhagwania was staying in a house close to the outpost and that the Havildar and the constable Rambilas were on intimate terms with her. The police officers warned Bhagwania and told the policemen that they would be reported against if further complaint againt their character was heard. On 10-9-1947, these appellants arrested Nageshwar and took him to the police station. Bhagwania and Babban Prasad also accompanied them, and it was stated by these policemen before the officer-in-charge that Nageshwar had been seen with five or six others near the outpost at night armed with bhalas and lathis. Nageshwar was questioned by the police Sub-Inspector and gave his statement in writing. The police Sub-Inspector allowed Nageshwar to go away and warned the Havildar and the constables that they would be prosecuted for wrongful confinement if they did any such thing in future.

[5] The occurrence resulting in the death of Nageshwar took place at about 2 P. M. on the same day, namely, 10-9-1947, and the prosecution case is that these two accused shot down Nageshwar. While Nageshwar was at the pan shop of one Hazari Khar, these two appellants came in uniform, each with a rifle in his hand and holding the rifles in firing position. The Havildar exclaimed "shikar agaiya", and Nageshwar, realising that his life was in danger, ran and got into the shop of one Bhola Mistry. The two accused fired at him and he fell down in the varanda of Bhola's shop, which is just by the side of the road. The two accused then entered the shop and fired again. They then retreated, and one of them shouted "Mar dala." There was a commotion in the Mahalla and all the shops were closed. Babban had heard of the gun-fire and he at once proceeded towards the outpost. But when he came near a mosque he found that the constables were preventing people from proceeding further. He then ran to the police station and informed the officer-in-charge that the constables at the out post had fired guns and that the people of the locality were in a state of panic. The officer-in-charge made a note in the station diary and at once left for the spot with some constables attached to the Railway Protection Force. When he was about 150 yards west of the outpost he noticed four or five constables holding their rifles in firing position. The Inspector of Police, Mr. Masih, having come to know that the policemen at the outpost had opened fire, also left for the outpost, and when he came to a place which was about 60 steps from the outpost, four or five constables attached to the outpost threatened to shoot him and the jamadar if they proceeded further. He shouted to them that he was their Inspector and that they must lay down arms and then state whatever they had to say. But in spite of his directions they did not surrender the arms, nor did they even salute him. These two accused were amongst those four or five constables. By this time the Superintendent of Police and the District Magistrate had been informed, and they arrived and brought the situation under control. Under the orders of the Sub-divisional Magistrate a Magistrate named Mr. Subarno went to the spot at about 5.30 P. M. on 10-9-1947, for the purpose of holding an inquiry. The Inspector of Police went to the shop of Bhola Mistry and there found the dead body of Nageshwar Kalwar. He held an inquest on the dead body and sent it for post mortem examination. The post mortem examinationwas held by the Civil Surgeon of Chapra at

5-30 P. M. on 10-9-1947. The Civil Surgeon found one "oval gunshot wound situated on the outer side of the right side of chest at the middle of the right mid-axillary line" and another "oval gun shot wound situated on the back at the level of the fourth thoracic vertebrae, outside the right of the middle line." On dissection he found the fifth and sixth ribs fractured and blown off at the costochondral junction on the right side causing a gaping wound of the size 3" x 2". He also found the upper part of the right ventricle of the heart lacerated on an area 1½" x 1". The doctor was of the opinion that death was due to the gunshot injuries and that either of the injuries was sufficient to cause the instantaneous death of the injured.

[6] Mr. Subarno examined the witnesses and inspected the place of occurrence. He found blood in large quantities and got the blood stains scraped. Two rifles were produced before him, and the barrels of these two rifles were found by him to be dirty and smoky.

[7] The accused pleaded not guilty, and their defence was that after his release by the Sub. Inspector Negeshwar with ten or twelve others had attacked the magazine, and that fire had been opened against him and the other raiders under the order of the Havildar, and, possibly, he received the bullet injuries during the course of that firing.

[8] The feelings between Nageshwar and the constables were no doubt strained, and in this connection it is necessary for us to examine the evidence of P. W. 3, the President of the Town Congress Committee, and P. W. 9, the Vice-President of the Town Congress Committee. It appears from the evidence of P. W. 3 that Babban and Nageshwar had appeared before him with the petition (Ex. 1) in which allegations had been made against the policemen posted at the outpost on 4-9-1947. This gentleman had been told that the constables at the outpost were threatening to shoot those persons of the locality who were protesting against their conduct. The evidence of P. W. 9 Ramchandra Prasad Jaiswal, the Vice-President, is to the effect that on 9-9-1947, these two accused had gone to his house with Musammat Bhagwania, and that the Havildar had told him that Nageshwar Kalwar was tutoring Musammat Bhagwania to tell the police officers that the constables were molesting her. This witness has further stated that he was told by the constables and the Havildar that if Nageshwar would create troubles in their way he would be set right. Here it will be convenient to refer to the evidence of the Sub-Inspector and the Inspector which gives us an idea about the conduct of these two policemen just after the alleged occurrence. The Sub-Inspector has deposed that at about 12 noon on 10-9-1947, these accused persons with two other constables of the outpost had brought under arrest Nageshwar Kalwar and that Musammat Bhagwania and Babban had accompanied them. The Havildar told the Sub-Inspector that at about 2 A. M. 5 or 6 men armed with bhalas and swords had been found sitting near the outpost under a pakar tree, and that with the help of his torch-light he had identified Nageshwar amongst those five or six men. The Sub-Inspector recorded the statement of Nageshwar which is an exhibit in the case. He says that he did not believe the statement of the accused Havildar and warned him and the constables that they would be prosecuted for wrongful confinement, if they did any such thing in future. Nageshwar was allowed to go away. At about 2-20 P. M. the same day Babban Prasad appeared before the Sub-Inspector and reported that the constables had opened fire and that there was great commotion and panic in the locality. The Inspector's evidence is that at about 2.30 P. M. he was informed that there had been firing at Katahri Bagh and that he hastened to the spot and met Sub-Inspector Tewari near the Karimchak mosque. He directed the Sub-Inspector to run to the Superintendent of Police, and along with a jamadar he proceeded towards the outpost. When he was 60 steps from the outpost four or five constables including these two accused threatened to shoot him dead if he proceeded further. The two accused further told him that they would shoot the Sub-Inspector Tewari dead as they had been insulted by him and because he had taken no action against Nageshwar Kalwar whom they had produced before him.

[9] Besides what is mentioned in Ex. 1, the petition which was filed by seven persons of the Mahalla before the President of the Town Congress Committee, we have got the evidence of Babban Prasad P. W. 14 for proving that the constables at the outpost were misbehaving with the girls and the mistresses. This witness had stated that his house is contiguous north of Katahri Bagh outpost and that these two accused had often made objectionable remarks against the girls or the mistresses of the Kanya Pathsala. The residents of the Mahalla had resented against their conduct, and many a time had asked the accused to behave decently with the girls and the mistresses. The learned advocate who appears for the appellants before us had asked us to reject the evidence of Babban Prasad on the ground that it is he who has engineered the whole case. We find no reason for assuming that it is Babban Prasad who has engineered this case against the accused, and, in my opinion, the evidence of Babban Prasad ought to be accepted.

[10] (After reviewing evidence for the prosecution and the defence his Lordship continued:) After having examined the entire evidence, I find that two witnesses have admitted, at least to some extent, that Nageshwar and these two policemen were carrying on love intrigues with the woman known as Bhagwania. But even if Nageshwar had some connection with Bhagwania, that cannot be of any assistance to the accused in this case. As a matter of fact it seems doubtful, even on reading the evidence of these two witnesses that they had full knowledge about the connection of Bhagwania with the deceased. It may be only their impression that Nageshwar was in love with Bhagwania.

[11] On the evidence I feel satisfied that the whole trouble was due to the fact that the people of the locality under the leadership of Nageshwar wanted to expose the misdeeds of these policemen. Certainly these policemen could not tolerate this, and they planned an attack on Nageshwar, whom probably they regarded as the leader of the Mahalla people. They felt exasperated when Nageshwar was let off by the Police Sub-Inspector, and when the Police Sub-Inspector reprimanded them, and that is the reason why they did not spare even the Sub-Inspector and had the courage and effrontery to tell the Inspector of Police that they would shoot down S. P. Tewari, Sub-Inspector. The mode of attack itself indicates that the two policemen were animated with the intention of killing the deceased and I am not able to agree with the appellants' learned lawyer that S. 34, Penal Code, has no application in this case. The Privy Council case in 72 I. A. 148[1] can easily be distinguished in this case as it was distinguished by the Madras High Court in I. L. R. 1947 Mad. 224.[2]

[12] Another question of law was raised by the appellants' learned lawyer, and it is this that certain necessary questions were not put to the accused when they were examined under S. 342, Criminal P. C. In my opinion, there was sufficient examination of the accused, and even if the examination be regarded as insufficient, that does not vitiate the trial. I may cite the case in 52 Cal. 522[3] in support of my view.

[13] There does not also appear to be any substance in the contention of the learned lawyer that the provisions of S. 289, Criminal P. C., were not complied with in this case. I do not think he is right in submitting that the accused should have been examined again. Clause (4) of section 289 does not mean anything else except this that if the accused calls no witness he or his pleader is to make his final address to the Court.

[14] Lastly, the appellants' learned lawyer argued that, even if these appellants are found to be guilty under S. 302, Penal Code, this is not a fit case in which the sentence of death should be awarded. In my opinion, capital sentence is the only appropriate sentence in this case, there being absolutely no extenuating circumstance. That such a wicked crime should have been committed by policemen who are expected to have due regard for law and whose duty it is to maintain order adds to the enormity of the offence. The reference is accepted, the sentence of death passed on the appellants is confirmed and the appeal is dismissed.

**Agarwala C. J.**—I agree.

R.G.D. *Reference accepted.*

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**A. I. R. (35) 1948 Patna 294** *[C. N. 105.]*

AGARWALA AG. C. J. AND RAMASWAMI J.

*Narayan Raut* — *Appellant* v. *Emperor.*

Criminal Appeal No. 315 of 1947, Decided on 11-12-1947, from decision of Addl. Sessions Judge, Chapra, D/- 26-7-1947.

**(a) Penal Code (1860), Ss. 97 and 99 — Land in possession of *N* — *B* and his party going to such land for purpose of ploughing it and thus dispossessing *N*—*N* striking *B* and killing him—Right of private defence of property held did not arise.**

One *N* was in possession of certain land which was not under any crop. *B* and his party went to the land for the purpose of ploughing the land and thus dispossessing *N*. *N* struck *B* and killed him:

*Held* that the land was not under crop at the time of occurrence. All that *B* and his party were doing was to plough the land. They were not doing any immediate harm. There was, therefore, ample time for *N* to have recourse to the public authorities for the protection of his rights. Hence *N* was not protected by any right of private defence of property. [Para 4]

**(b) Evidence Act (1872), S. 105—Right of private defence—Quantum of proof required under S. 105 is not proof beyond reasonable doubt—It is sufficient if accused makes out prima facie case—Penal Code (1860), S. 96.**

When the accused person pleads the right of private defence it is not necessary that he must prove beyond reasonable doubt the existence of the circumstances on which the right is founded. The accused need merely make out a prima facie case. In other words, it is sufficient if he satisfies the Court of the probability of what he is called upon to establish. It is not necessary for the accused to lead evidence if he is able to establish what he seeks to prove by the evidence that is on the record. If from that evidence it appears probable that the defence version is true, he is entitled to a decision in his favour even though he has not proved the truth of his version beyond reasonable doubt: (1943) 1 K. B. 607; (1936) 2 All. E. R. 1138 and 28 A. I. R. 1941 All. 402 (F.B.), *Rel. on.* [Paras 7 & 10]

*Cases referred*:—

1. (1943) 1 K. B. 607 : 112 L. J. K. B. 581 : 169 L. T 175 : 1943-2 All. E. R, 156, Rex v. Carr Briant.
2. (1936) 2 All. E. R. 1138, Sodeman v. Rex.
3. (1858) 6 H. L. C. 746 : 27 L. J. K. B. 449, Cooper v. Slade.
4. Cri. Appeal No. 124 of 1947, D/- 22-7-1947, Mathura Singh v. Emperor.
5. ('41) I. L. R. 1941 All. 843 : 28 A. I. R. 1941 All. 402 : 197 I. C. 525 : 43 Cr. L. J. 177 (F,B.), Emperor v. Parbhoo.

6. (1935) 1935 A. C. 462 : 104 L. J. K. B. 433 : 153 L. T. 232, Woolmington v. Director of Public Prosecutions.

*Brahmadeva Narain* — for Appellant.

*Government Advocate* — for the Crown.

**Agarwala Ag. C. J.**— The appellant has been sentenced to transportation for life on the charge of murdering Bujhawan Raut on 26-1-1946.

[2] The occurrence which gave rise to the death of Bujhawan has its origin in a dispute about two plots of land Nos. 2380 and 2381 in village Chhitouli. The prosecution case is that, on a civil Court partition between Devi Prasad (P. W. 8) and his cosharer some years ago, these two plots were allotted to Devi Prasad, and that, thereafter, he left them in batai to Rajkumar (P. W. 2) for a number of years, and then, eventually, sold them to him on 26-1-1946, although the appellant Narayan Raut was anxious to buy them. It is said that on the morning of 2-10-1946 Rajkumar, his sons Ramsakal (P. W. 1) and Ugam (P. W. 4) and his brother Bujhawan were ploughing this land when seven persons including the appellant appeared on the scene and ordered the ploughing to be stopped. Rajkumar protested, and, it is said, that Nagina then struck him three blows with a lathi, and that, when Bujhawan protested, Narayan struck him with a bhala. Ramsakal is alleged to have been struck by Baburam with a bhala and by Sakal and Sheosaran with lathis. Similarly, Sheologan and Kesar are said to have struck Ugam with lathis. The injured men left for the police station in the company of the chaukidar, but Bujhawan died en route. A first information was laid by Rajkumar at 3 P. M., the police station being six miles away. On these facts Narayan was charged with the murder of Bujhawan and the remainder were charged under S. 302/149. There were also charges of rioting and of injuries committed on the other injured men in prosecution of the common object of the rioters.

[3] The defence was that Narayan was in possession on the day of occurrence and had been in possession for many years beforehand. His case is that he was in possession long before the civil Court partition between Devi Prasad and his co-sharer, and that the sale to Rajkumar by Devi Prasad was merely effected for the purpose of dispossessing him. The defence was that on 2-10-1946, when it was found that Rajkumar and his men were ploughing the land, Narayan went and protested. He was then assaulted, with the result that the other accused came to his assitance, and in the fracas which occurred four of them were injured. The Court below has found that Narayan was in possession, and that the prosecution party did go to the land on the date of the occurrence for the purpose of ploughing it and dispossessing Narayan. The medical evidence shews that four of the defence party received lathi injuries, two of them sustaining injuries on their heads. The question that arises, in these circumstances, is whether the accused persons were protected by the right of private defence. The Court below has held that they had a right to defend their possession of the land, but that Narayan exceeded that right by inflicting a fatal blow on Bujhawan. He has, therefore, acquitted all the accused on the charges of rioting. He has also acquitted those accused who were charged with inflicting injuries on persons other than Bujhawan in the view that they did not exceed the right of private defence, but has convicted and sentenced Narayan as stated above because he has exceeded the right of private defence.

[4] The Court below has fallen into an error in considering that there was any right of private defence of property in this case. The land was not under crop at the time of the occurrence. All that the prosecution party were doing was to plough the land. They were not doing any immediate harm. There was, therefore, ample time for Narayan to have recourse to the public authorities for the protection of his rights. In this case, as so often happens in cases of this nature, the fact that the right of private defence does not arise when there is time to have recourse to the public authorities, has been overlooked. Even in this Court the learned Advocate referred us to S. 97, Penal Code, and argued that as the act of the prosecution party amounted to criminal trespass, the defence were protected by that section. The section, however, expressly states that it is subject to S. 99, which explicitly provides that there is no right to private defence when there is time to have recourse to the public authorities.

[5] The next question that arises is whether Narayan was protected by the right of private defence of person. For the determination of this question it is necessary to consider the facts, and they are these : Narayan was in possession. The prosecution party went with the deliberate object of taking forcible possession. With this aim in view they went armed and commenced ploughing the land. Narayan protested. Upto this stage the facts are clear. What is not so clear is whether the prosecution story is true that Narayan and his companions began an assault on Rajkumar and his companions, or whether Narayan's protest led the prosecution party to attack him and the men who were with him. Now, the learned Government Advocate rightly points out that the burden of proving the circumstances which justify the exercise of the right of private defence rests on the accused. The law on that subject is contained in S. 105, Evidence Act, which states that the burden is on the person pleading

the right and that the Court shall presume the absence of circumstances justifying the exercise of such right in the absence of evidence. It is contended that this section means that when the accused person pleads the right of private defence, he must prove beyond reasonable doubt the existence of the circumstances on which the right is founded, and, if that proposition is true, it must be conceded in this case that the defence have not proved beyond reasonable doubt that the prosecution party were the first to attack Narayan and his companions. What has to be considered, therefore, is the nature, or rather the extent of the burden which lies on the accused to establish circumstances justifying the exercise of the right of private defence. A similar question has lately been the subject-matter of discussion in the King's Bench Division in (1943) 1 K. B. 607[1]. The enactment which was being considered in that case was S. 2, Prevention of Corruption Act, 1916, which provides that where in any proceedings against a person for an offence under the Act it is proved that any money, gift, or other consideration has been paid or given to or received by a person in public employment, or the agent of such person, the money, gift or consideration shall be deemed to have been paid or given and received corruptly unless the contrary is proved. It will be observed that the effect of that section is that when the prosecution has proved that the accused has received money, gift, or consideration, a presumption arises, that it was received corruptly, and that the onus of proving that it was innocently received lies on the accused. The learned Judges who decided that case held that, where either by statute or common law some matter is presumed against an accused person, unless the contrary is proved, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish. What was held, therefore, in this case was that the accused was not required to prove that the receipt of the money was innocent beyond reasonable doubt, but that what he was required to prove was that the circumstances were such that the receipt was probably innocent.

[6] The learned Judges referred to the decision in (1936) 2 ALL E. R. 1138[2] which is a decision of the Privy Council. That was a case where the accused in a murder charge pleaded insanity, and the onus of proof was under consideration. The case is important in this country because the plea of insanity, like the plea of right of private defence of property, is one of those general exceptions the burden of proving which is placed on the defence by S. 105, Evidence Act. Their Lordships of the Privy Council held that the burden, in cases in which the accused has to prove insanity may fairly be stated as not being higher than the burden which rests on the plaintiff or defendant in civil proceedings. In civil cases the preponderance of probability constitutes sufficient ground for the verdict: see (1858) 6 H. L. C. 746, [3] at 772. These cases have recently been referred to by my learned brother in Cri. Appeal No. 124 of 1947.[4] The question has also been considered by a Full Bench of the Allahabad High Court in I. L. R. (1941) ALL. 843 ,[5] where the majority of the learned Judges held that, having regard to S. 96, Penal Code, and S. 105, Evidence Act, in all cases in which the right of private defence or any other general exception in the Penal Code is pleaded by an accused persons, and evidence is adduced to support such plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused person is entitled to be acquitted, if upon a consideration of the evidence as a whole reasonable doubt has crept into the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception.

[7] In the present case the defence led no evidence to prove the circumstance on which they rely as a foundation for the exercise of the right of private defence, namely, that the prosecution party commenced the attack. It is not necessary for the defence to lead evidence if they are able to establish what they seek to prove by the evidence that is on the record. If from that evidence it appears probable that the defence version is true, they are entitled to a decision in their favour, even though they have not proved the truth of their version beyond reasonable doubt. The circumstances which have been established by the evidence of the prosecution in the present case do, in my opinion, raise a probability that the defence version is true. As I have already stated above, the prosecution party went to the scene armed, with the deliberate intention of dispossessing Narayan, who was in possession, and they inflicted injuries on Narayan and the men who were with him. Having done that they have deliberately suppressed the fact that they did so. Every witness who was examined by the prosecution relating to the incident has denied that any injuries were inflicted on any member of the defence party. The fact that they considered it necessary to do so suggests the inference that they were aware of the fact that, if they admitted the injuries caused to the defence, they would have to be prepared to state

at what stage of the proceedings these injuries were inflicted, that is to say, whether they were inflicted before Narayan inflicted the fatal injury on Bujhawan or after. A consideration of all the circumstances that have been proved, in my view, suggests the probability that the prosecution party were the aggressors. That, however, does not necessarily exonerate Narayan for the injury which he inflicted on Bujhawan. The injury was a fatal one from which Bujhawan expired very soon after it was inflicted, and, in order to be exonerated from the consequences of inflicting this injury, it is necessary for Narayan to prove more than has been proved in this case. Although some of the injuries inflicted on four members of his party were on the head, none of them appears to have been of such gravity as to justify the conclusion that there was any reason for him to apprehend that either he or any member of his party would be killed, or would receive grievous injury. He was not, therefore, justified in causing the death of Bujhawan. The weapon he used, however, was a bhala, and he must have known that an injury inflicted with such a weapon was likely to cause death, even though he had no intention either to cause death or grievous bodily injury. I would, therefore, alter the conviction from one of murder to one under the second part of S. 304 and alter the sentence from transportation for life to rigorous imprisonment for two years.

[8] **Ramaswami J.**—I agree that this appeal should be allowed to extent proposed. I agree that S. 105, Evidence Act, should be construed in the manner expounded by My Lord the Chief Justice.

[9] In the recent case in Cri. Appeal No. 124 of 1947, [4] I had occasion to examine and construe in a similar fashion the provisions of S.105, Evidence Act. Under this section the burden of proving an exception is upon the person accused of an offence, and the section lays down that the Court shall presume the absence of such circumstances. It is axiomatic that the prosecution must prove the prisoner guilty beyond all reasonable doubt (1935 A. C. 462[6]); but is the same burden placed on the prisoner where either by statute or by common law some matter is presumed against him unless contrary is proved ? In (1936) 2 ALL. E. R. 1138[2] Lord Hailsham thought that the burden of proof for the defence was not so onerous, that it was certainly plain that the burden in cases where accused had to prove insanity was not higher than the burden which rested upon the plaintiff or defendant in a civil proceeding. In the more recent case (1943) 1 K. B. 607,[1] the defendant was charged with an offence under the Prevention of Corruption Act, 1916, which provided in S. 2 that in certain circumstances the onus of proving that payments made to a Government employee were not corruptly made was on the defendant. The trial Judge charged the jury that it was the defendant's duty to satisfy them "beyond reasonable doubt". But the Court of Criminal Appeal quashed the conviction on the ground that burden of proof was not so onerous. It was no more than that which rested on the plaintiff in a civil proceeding; and therefore it was sufficient if accused satisfied the jury of the probability of that which he was called upon to establish.

[9] In the Indian case (I. L. R. (1941) ALL. 843 [5]) a majority of three out of five Judges construed S. 105, Evidence Act, to mean that though the accused failed to satisfy the Court affirmatively of the existence of the pleaded exception, the accused was entitled to be acquitted if upon consideration of the evidence as a whole (including the evidence in support of plea of exception) a reasonable doubt was created in the mind of Court as regards the guilt of the accused.

[10] I am definitely of opinion that the quantum of proof required under S. 105, Evidence Act, is not proof beyond reasonable doubt; that the accused need merely make out a *prima facie* case, in other words, it is sufficient if he satisfied the Court of the probability of what he is called upon to establish.

[11] Apart from the weight of authorities this construction is obviously reasonable, for it would be strange if a principle of law intended to benefit the accused could be used to his disadvantage.

D.S. *Conviction altered.*

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**A. I. R. (35) 1948 Patna 297** *[C. N. 106.]*

DAS J.

*Fesu Sheikh and another — Petitioners* v. *Emperor.*

Criminal Revn. No. 761 of 1947, Decided on 14-10-1947, from order of Sessions Judge, Santal Perganas, D/- 30-6-1947.

Bihar Cattle, Fowl, Eggs, Sheep and Goats (Movement) Control Order (1943), Cl. 3 — Order is not kept alive by Bihar Essential Articles Control (Temporary Powers) Ordinance, 1946 — Export of cattle from Bihar to Bengal in January 1947 held no offence — Bihar Essential Articles Control (Temporary Powers) Ordinance (1946), S. 5.

The Bihar Cattle, Fowl, Eggs, Sheep and Goats (Movement) Control Order (1943) has come to an end on September 30, 1946, and the Bihar Essential Articles Control (Temporary Powers) Ordinance, 1946 cannot keep the Control Order of 1943, alive in so far as it relates to the export of cattle from Bihar to a place outside Bihar as the Provincial Legislature could not pass such a law because the power of the Provincial Legislature to legislate in respect of items 27 and 29 of the Provincial Legislative List is subject to the restriction contained

in S. 297, Constitution Act. As the Provincial Legislature could not ban the export of cattle from Bihar to Bengal, the Governor could not do so by the Control Ordinance made under S. 88, Constitution Act.

Hence export of cattle from Bihar to Bengal in January 1947 without permit is no offence under cl. 3 of the Control Order. [Para 2]

*S. R. Ghosal* — for Petitioners.

*Government Advocate* — for the Crown.

**Order.**— This is an application in revision against an order of the learned Sessions Judge of the Santal Perganas, dated 30-6-1947, by which the learned Judge, while setting aside the conviction and sentence passed against the petitioners, has directed a fresh trial of the petitioners for certain offences alleged to have been committed by them. It is contended on behalf of the petitioners that they had committed no offence, and, therefore, a fresh trial is not warranted by law.

[2] The allegation against the petitioners was that on 18-1-1947, they were taking 18 heads of buffaloes from Bihar to Bengal. It was alleged that they had contrevened the provisions of clause 3 of the Bihar Cattle Fowl, Eggs, Sheep and Goats (Movement) Control Order, 1943 (hereinafter referred to as the Control Order 1943 for the sake of brevity and convenience). That clause of the Control Order 1943 says, inter alia, that no person shall carry or move any cattle from any district in the Province of Bihar to any place outside the Province of Bihar except with the written permission of the Chief Controller of Prices and Supplies, Bihar, etc. The word "cattle" in the Control Order 1943, includes a buffalo. It is the admitted position that the Control Order 1943, expired on 30-9-1946, the date on which the Defence of India Act, 1939, and the rules made thereunder expired. Learned counsel for the Crown does not contest this position. The offence in this case was alleged to have been committed on 18-1-1947. If there were no other law except the Control Order 1943, which had expired on 30-9-1946, then the petitioners would undoubtedly be not guilty of any offence when they attempted to remove some buffaloes from Bihar to Bengal. The Courts below thought, however, that the petitioners would be liable under S. 5 of the Bihar Essential Articles Control (Temporary Powers) Ordinance, 1946, (hereinafter referred to as the Control Ordinanee for the sake of brevity and convenience). Section 5 of the Control Ordinance lays down, among other things, that every order made by the Provincial Government under any of the provisions of the Defence of India Rules in respect of any of the matters specified in S. 3 relating to an essential article, which having been notified in the Official Gazette was in force immediately before the commencement of this Ordinance shall, in so far as it could validly have been made by the Provincial Government under this Ordinance, continue in force as if made by the Provincial Government under the provisions of this Ordinance etc. The expression "essential articles" has been defined in S. 2 of the Control Ordinance. That definition says that "essential article" means any of the articles which is specified in the schedule to the Ordinance. Item 11 of the Schedule is as follows. "Cattle, goats, sheep and fowls" Obviously, therefore, cattle including buffaloes is an essential article as defined in the Ordinance. Section 5 of the Control Ordinance would, therefore, keep the Control Order 1943, in force provided the latter could have been validly made by the Provincial Government under the Control Ordinance. The preamble to the Control Ordinance shows that it was made as there was necessity of immediate action to regulate the production, supply, distribution, transport, etc., of essential articles and trade and commerce therein within the province of Bihar. The reference in the preamble is obviously to items 27 and 29 of the Provincial Legislative List. Section 297 of the Constitution Act says that no Provincial Legislature or Government shall, by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production supply, and distribution of commodities, have power to pass any law or to take any excessive action prohibiting or restricting the entry into or export from, the Province of goods of any class or description. It is clear, therefore, that the power of the Provincial Legislature to legislate in respect of items 27 and 29 of the Provincial Legislative List is subject to the restriction contained in S. 297 of the Constitution Act. The Provincial Governor has made the Control Ordinance under S. 88 of the Constitution Act. Sub-section (3) of that section says that if and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void. If the Provincial Legislature could not ban the export of cattle from Bihar to Bengal, the Governor could not do so by the Control Ordinance made under S. 88 of the Constitution Act. Section 3 of the Control Order, 1943, by which the movement of cattle from Bihar to a place outside Bihar was banned, is clearly a prohibition regarding the export of goods from the province to a place outside it. If the Provincial Legislature could not pass such a law, then the Control Ordinance would not have validly kept alive that provision of the Control Order, 1943, which prohibited the export of cattle from Bihar to Bengal. That being the position, S. 5 of the Control Ordinance is of no help to the Crown in the

present case. I may further observe that the expression "transport" occurring in the Control Ordinance has been defined as movement from one place to another within the province of Bihar, it has no reference to export from Bihar to a place outside Bihar. The net result of the examination of the relevant provisions of the Control Order, 1943, and the Control Ordinance is, therefore, this; the Control Order of 1943 had come to an end on 30th September 1946, and the Control Ordinance of 1946 cannot keep the Control Order of 1943, alive in so far as it relates to the export of cattle from Bihar to a place outside Bihar. Some reference has also been made to the Bihar Essential Articles Control (Temporary Powers) Act, 1947. That Act, however, came into force on 16th March 1947, and cannot have any operation so far as the present case is concerned where the offence was alleged to have been committed on 18th January 1947. I therefore, do not propose to consider the provisions of that Act which came into force on 16th March 1947. The learned Government Advocate has placed before me a Press Note issued by the provincial Government. The press note reads as follows.

"It is notified for public information that the prohibition of movements of cattle, goats, sheep and fowls from Bihar to place outside Bihar was automatically rescinded with the lapse of the Defence of India Rules on 30th September 1946, and as such no permits are necessary for such movements."

This press note was issued on 12th May 1947. Obviously, therefore, the Provincial Government have also taken up the same position as indicated by me above, namely, that the Control Order of 1943 had come to an end on 30th September 1946, and no permit was necessary for the movement of cattle from Bihar to places outside Bihar under the Control Order of 1943.

[3] Ordinarily, I should have placed this case before a Division Bench for decision, as it raised the important question as to whether the Control Order of 1943 was kept alive by the Control Ordinance of 1946. In view, however, of the press note which has been issued by the Provincial Government and of the submissions made by the learned Government Advocate, I consider it unnecessary to place the case before a larger Bench. It seems to me that it is clear that the Control Order of 1943 has not been kept alive by the Control Ordinance of 1946, so far as the export of cattle from Bihar to places outside Bihar is concerned. I may, however, mention one other thing as a safeguard against the application of the decision to other commodities. There is a Central Ordinance (Ordinance XVIII of 1946) known as the Essential Supplies (Temporary Powers) Ordinance 1946, the goods or commodities in respect of which the Central Ordinance applies stand on a different footing. It is sufficient to note that cattle is not one of the commodities hit by that Ordinance. Therefore there is no question of the application of the Ordinance XVIII of 1946 to the present case.

[4] For the reasons given above, the application is allowed and the order of the learned Sessions Judge directing a fresh trial of the petitioners is set aside. The petitioners are clearly entitled to an acquittal. The order of forfeiture passed by the learned Magistrate must also be set aside.

S.C. *Application allowed.*

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## A. I. R. (35) 1948 Patna 299 *[C. N. 107.]*

DAS J.

*Chiranji Lall and another — Petitioners* v. *Durga Dutt Tripathi — Opposite Party.*

Criminal Revn. No. 1052 of 1947, Decided on 26th February 1948, from order of Addl. Sessions Judge, Shahabad, D/- 9th October 1947.

(a) Penal Code (1860), S. 339 — Preventing person from proceeding homeward on "ekka" — It amounts to wrongful restraint.

Preventing a person from proceeding homeward on the "ekka" would amount to preventing him from proceeding in the direction in which he wanted to proceed, and would, therefore, be wrongful restraint as defined in S. 339. [Para 3]

(b) Penal Code (1860), S. 79 — Contravention of Rules relating to purchase and movement of cloth —Private person cannot apprehend—Person apprehending cannot take plea under S. 79.

Where a person has any suspicion that another is removing cloth by contravening any of the rules relating to the purchase and movement of cloth he can give an information to the authorities concerned. He has no legal right to restrain the free movement of another. To such a case first part of S. 79 has no application. The second part also has no application. To satisfy the Court of good faith, a person must show that he acted with due care and attention, and had reasonable ground prima facie for believing that he ought to do what he did : 26 A.I.R. 1939 Pat. 256, *Expl.* [Para 3]

*Case referred* :—

1. ('39) 20 P.L.T. 467 : 26 A.I.R. 1939 Pat. 256 : 182 I. C. 979 : 40 Cr. L. J. 720, Lal Behari Singh v. Emperor.

*Baldeva Sahay and A. B. N. Sinha*—for Petitioners.

*Raj Kishore Prasad, Shyambehari Prasad and Angad Ojha*—for Opposite Party.

**Order.** — The two petitioners, young men of 27 and 28, have been convicted under S. 341, Penal Code, and sentenced to simple imprisonment for one month and a fine of Rs. 50 each. The prosecution case was that on 24th April 1945, at about 4 P. M. they had wrongfully restrained one Durgadutt Tripathi, a cloth inspector of Buxar, while the latter was going home on an "ekka" with a bundle of cloth and other miscellaneous articles to attend the 'bidai' ceremony of his sister. The two petitioners were alleged to have stopped the "ekka" and prevented the cloth inspector from going home. They

took the cloth inspector to the thana where an information was given by the cloth inspector about the wrongful restraint. A counter information was also given by the two petitioners alleging that the cloth inspector was removing cloth in contravention of the rules then in force regarding the purchase and movement of cloth. The local police submitted a final report in both the informations. The cloth inspector then filed a complaint on which the present petitioners were put on trial with the result stated above.

[2] On behalf of the petitioners three points have been urged before me. Firstly, it is contended that in the earliest statement made by the cloth inspector no allegation was made that any physical obstruction had been given to him. It is contended that the conviction of the petitioners under S. 341, Penal Code, is bad in law in the absence of a clear finding that they had physically obstructed the cloth inspector from proceeding in the direction in which he wanted to proceed. Secondly, it has been contended that even if the petitioners had physically obstructed the cloth inspector from proceeding in the direction in which he wanted to proceed, they had done so in good faith, and cannot be held guilty of any offence. The third point which has been urged, relates to the question of the sentence.

[3] In the earliest statement which the cloth inspector had made, namely, the information which he gave at the Police station, he had mentioned that he was wrongfully restrained, though no details of any physical act of obstruction were given. The Courts below have considered the evidence, and on that they have found that the cloth inspector was prevented from proceeding homeward on the "ekka." That in my opinion, would amount to preventing the cloth inspector from proceeding in the direction in which he wanted to proceed, and would, therefore, be wrongful restraint as defined in S. 339, Penal Code. As to the second point, my attention has been drawn to the evidence of the cloth inspector and that of the Sub-Inspector of Police. It appears that the cloth inspector was taking ornaments and Benarsi "saris" which were not controlled, some pairs of new "dhotis" and "saris". The plea of the cloth inspcetor was that he purchased some of the cloth and had taken some for approval. Comment has been made before me that the cloth inspector was not in a position to produce any voucher in support of his plea of purchase. Whatever that may be, I am unable to accept the contention that the petitioners are protected by good faith such as is mentioned in S. 79, Penal Code. Learned counsel for the petitioners has relied on a decision of this Court in 20 P. L. T. 467[1] where a bullock cart was stopped by some persons who were on the look out for a kidnapped girl. In view of the facts of that case, the plea based on S. 79, Penal Code, was accepted. Section 79, Penal Code, is in two parts. The first part says that nothing is an offence which is done by any person who is justified by law. It is clear to me that that part does not apply in the present case. The petitioners were not justified by law in either apprehending the cloth inspector or compelling him to go to the thana; nor were they justified in preventing him from going in the direction in which he wanted to go. If the petitioners had any suspicion that the cloth inspector had contravened any of the rules relating to the purchase and movement of cloth, they could have given an information to the authorities concerned. They had no legal right to restrain the free movement of the cloth inspector. The second part of S. 79, Penal Code, states that nothing is an offence which is done by any person who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it. The Courts below have found that there was no good faith in the petitioners. To satisfy the Court of good faith, a person must show that he acted with due care and attention, and had reasonable ground *prima facie* for believing that he ought to do what he did. It seems to me that the petitioners in their zeal over-stepped the limits of law. I am unable to accept the contention that they acted in good faith.

[4] As to the sentence, I think, having regard to the circumstances of this case, there is room for reduction. Therefore, while upholding the conviction, I would reduce the sentence to a fine of Rs. 25 only, or in default, simple imprisonment for a month each against the petitioners. Subject to this reduction of the sentence, the application is dismissed.

R.G.D. *Revision dismissed.*

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**A. I. R. (35) 1948 Patna 300** *[C. N. 108.]*

MANOHAR LALL AND BENNETT JJ.

*Kamakshya Narain Singh—Plaintiff—Appellant* v. *Fateh Kumar Singh and others—Defendants—Respondents.*

A. F. A. D. No. 776 of 1944, Decided on 11th February 1947, from decision of Addl. Sub-Judge, Hazaribagh, D/- 28th March 1944.

(a) Civil P. C. (1908), S. 11 — Parties and representative—Minor — Decision against, by negligent conduct of litigation by guardian, whether operates as res judicata—Civil P. C. (1908), O. 32 *(Obiter)*.

If a minor is not protected against the negligent acts of his guardian, the door is left wide open to undetectable fraud and grave injustice as a result of which minor children would be completely deprived of their inheritance. [Para 4]

Order 32 of Civil P. C. contains no express provision to the effect that where a guardian ad litem of a minor

is properly appointed thereunder to represent a minor, the minor shall be bound by the decision in the litigation as if he had been a party thereto and it may well be, therefore that that question has been left open to be decided upon the facts of each particular case in accordance with the principles of justice, equity and good conscience. [Para 4]

(In view of the divergence of opinion, the question whether the decision obtained against a minor by the negligent act of his guardian in the conduct of the litigation, operates as *res judicata* against the minor, held should be referred to a Full Bench, when the question comes up again for decision) : 24 A. I. R. 1937 P. C. 1, *Expl.*; 5 A. I. R. 1918 Pat. 211; 14 A. I. R. 1927 Pat. 271; 22 A. I. R. 1935 Pat. 24; F. A. No. 168 of 1937 and F. A. No. 163 of 1941, *Ref.* [Para 4]

Annotation : ('44-Com.) Civil P. C., S. 11 Note 69 Pt. 3; O. 32 R. 1, N. 10; O. 32 R. 3, N. 13.

(b) Civil P. C. (1908), O. 32, R. 1— Suit by minor for possession after attaining majority—Held barred by limitation — Previous decision against minor involving similar issue and subject-matter — No appeal by guardian — On attaining majority minor should file appeal after getting time for appeal extended—Limitation Act (1908), S. 5.

Title suit brought by the Court of Wards on behalf of the minor, for possession of the land was dismissed. No appeal was however filed. On attaining majority the minor filed second suit for possession. The limitation for the suit had already expired. It was alleged that the previous decision was not binding on the plaintiff on the ground that the Court of Wards had acted with gross negligence in not preferring an appeal against the decision :

*Held*, that the plaintiff should have immediately applied after attaining majority to have the time for appeal extended and that the suit as instituted was barred by limitation. [Para 5]

Annotation : ('42-Com.) Lim. Act, S. 5 N. 16.
('44-Com.) Civil P. C., O. 32 R. 1 Notes 10 and 12.

*Cases referred* :—

1. ('37) 64 I. A. 17 : 24 A. I. R. 1937 P. C. 1 : I.L.R. (1937) Mad. 263 : 166 I. C. 1 (P. C.), Venkata Sheshayya v. Kotiswara Rao.
2. ('18) 5 A. I. R. 1918 Pat. 211 : 45 I. C. 253, Bhairo Prasad Sahu v. Ram Chandra.
3. ('27) 6 Pat. 388 : 14 A. I. R. 1927 Pat. 271 : 102 I. C. 449, Ganga Nand Singh v. Rameshwar Singh.
4. ('35) 14 Pat. 824 : 23 A. I. R. 1936 Pat. 231 : 162 I. C. 235, Mathura Singh v. Rama Rudra Parshad.
5. ('35) 22 A. I. R. 1935 Pat. 24 : 154 I. C. 948, Kali Charan Singh v. Hirdai Narain.
6. ('23) 45 M. L. J. 324 : 10 A. I. R. 1923 Mad. 718 : 74 I. C. 218, Bapanna v. Yerramma.

*L. K. Jha and Shambhu Prasad Singh* — for Appellant.

*B. C. De, S. P. Srivastava and S. M. Siddique*— for Respondents.

**Bennett J.** — This is an appeal from the decision of the Additional Subordinate Judge, Hazaribagh, affirming the decision of the Munsif of Hazaribagh in a suit in which the appellant claimed the recovery of possession of certain lands by the ejectment of the respondents.

[2] In 1897, the appellant's grandfather resumed possession of the land in question and remained in possession thereof, according to the appellant, until his death in 1913 or, according to the respondents' father in 1911. When the appellant's grandfather died, his father was a minor and the estate came under the management of the Court of Wards. The appellant's father attained his majority on 6-4-1919, and on that date the estate was notified to be released. Four days later, however, appellant's father died and as the appellant was then a minor the Court of Wards remained in possession until he attained his majority on 10-8-1937. During the appellant's minority, the Court of Wards brought Title Suit No. 162 of 1926 to recover possession of the land in question from the respondents, but the claim was dismissed. Mr. N. C. Mitter, the advocate in the suit advised an appeal, but no appeal was filed. In evidence Mr. N. C. Mitter stated that his opinion was sent to the Legal Remembrancer but he did not know why no appeal was filed.

[3] The two relevant issues in the suit were, firstly, whether having regard to the alleged grossly negligent conduct thereof by the Court of Wards, the decision in Title Suit No. 162 of 1926 is res judicata between the parties, as to which the learned Munsif found in the negative and the learned Subordinate Judge in the affirmative, and secondly, whether the suit is barred by limitation and adverse possession, as to which there are concurrent findings in the affirmative.

[4] In the view which I have taken on issue 2 it is unnecessary for me to express any final opinion as to the proper answer on issue 1. As, however, the point was argued at some length before us and our attention called to the relevant authorities, I would remark that there are apparently conflicting decisions of this Court and that it is desirable that the point when it again comes before this Court should be referred to a Full Bench for decision. Prior to the decision of the Privy Council in 64 I. A. 17,[1] there was a consistent jurisprudence of this Court : *see* cases reported in A. I. R. 1918 Pat. 211,[2] 6 Pat. 388;[3] 14 Pat. 824,[4] A. I. R. 1935 Pat. 24[5] that gross negligence on the part of a guardian ad-litem will entitle the minor to the avoidance of proceedings decided against him. In 64 I. A. 17,[1] however, their Lordships of the Privy Council in refusing to extend the alleged principles relating to the negligent conduct of a former litigation by a guardian in the name of the minor to the negligent conduct of a former litigation by the dharmakarta of a public temple, stated that they were not concerned in that case to discuss the validity of the decisions illustrative of the above-mentioned principles and went on to say :

"The protection of minors against the negligent actings of their guardians is a special one. . . . . Their Lordships would only add that they are not prepared to agree with the view expressed in 45 M. L. J. 324[6] that the principle of S. 44, Evidence Act, can be extended to cases of gross negligence."

Their Lordships went on to enunciate the scope of S. 11, Civil P. C., as follows:

"The provisions of S. 11, Civil P. C. are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts."

Following this decision of their Lordships of the Privy Council there have been two unreported decisions of Division Benches of this Court in First Appeal No. 168 of 1937 and First Appeal No. 163 of 1941 which are directly contradictory of the earlier jurisprudence of this Court. This is a matter of considerable public importance because if a minor is not protected against the negligent actings of his guardian, the door is left wide open to undetectable fraud and grave injustice as a result of which minor children would be completely deprived of their inheritance. I do not understand the reservation of their Lordships of the Privy Council in the above-mentioned case in any way to reflect upon the principles established by the earlier cases and protecting minors from the negligent conduct of a former litigation by their guardian ad litem except in so far as those cases purport to extend the provisions of S. 44, Evidence Act, beyond the scope limited by the plain and obvious meaning of the words therein used, and it may well be that the principles protecting a minor from the negligent conduct of a former litigation by his guardian ad litem are to be founded not upon or by extension of or by way of analogy to S. 44, Evidence Act, but upon the proposition that the minor can only properly be considered to have been a party to the former litigation in so far as he was properly represented therein by his guardian ad litem, and that when the guardian ad litem neglects a plain duty, the minor cannot be said to have been properly represented. Order 32, Civil P. C. contains no express provision to the effect that where a guardian ad litem of a minor is properly appointed thereunder to represent a minor, the minor shall be bound by the decision in the litigation as if he had been a party thereto, and it may well be, therefore, that that question has been left open to be decided upon the facts of each particular case in accordance with the principles of justice, equity and good conscience.

[5] Whatever may have been the date upon which the respondents' father entered into possession of the lands here in question, it was a common ground that the appellant's father was in possession thereof on 6th April 1919, when he attained his majority, and, that being so, it is clear that time began to run against the appellant's father as from that date. The death of the appellant's father followed by the subsequent minority of the appellant himself did not operate to stop or interrupt the running of the time, and it follows that twelve years thereafter the appellant's right of action was barred by limitation. It is clear, therefore, that on 9th August 1940, when the appellant commenced his suit, his right of action was statute barred. The proper remedy of the appellant was to have applied immediately after attaining his majority on 10th August 1937, for the extension of the time to appeal from the decision given against the Court of Wards in Title Suit No. 162 of 1926. Mr. L. K. Jha for the appellant urged that if in fact there was gross negligence by the Court of Wards in not prosecuting the appeal it would be lamentable that the appellant should now be shut out from appealing against that decree and, in order to facilitate an application for extension of time for that purpose, he pressed us to record a finding as to such negligence. In the interests of justice, we have read the judgment in Title Suit No. 162 of 1926 and heard argument thereon. Having done so, I am of opinion that it is not desirable for this Court to record any finding one way or the other on the point.

[6] In the result I can see no reason to differ in this appeal from the concurrent findings on the question of limitation arrived at by both the Courts below and I would, accordingly, dismiss the appeal with costs.

**Manohar Lall J.**—I agree.

R.G.D. *Appeal dismissed.*

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**A. I. R. (35) 1918 Patna 302** *[C. N. 109.]*

MEREDITH AND RAY JJ.

*Goshawarali—Defendant — Appellant* v. *Adhiklal Sahu and another— Plaintiffs — Respondents.*

A. F. A. D. No. 1012 of 1944, Decided on 27-11-1946, from decision of Addl. Dist. Judge, Monghyr, D/- 17-7-1944.

**(a) Civil P. C. (1908), S. 11, Expl. IV—"Litigating under same title", meaning of.**

Where in each of the two cases a person was litigating in his individual capacity for his own self and in his own interest, and the cause of action in both the cases was the same; in one of previous suits he claimed as owner and in another as mortgagee of the disputed property; in both suits he claimed that he had "the right to possess":

*Held*, that the person was litigating under the same title which is distinct from "litigating under different titles." It is only when the plaintiff or the defendant, as the case may be, sues or is sued in several suits as different legal persons, the personality has reference to his capacity to sue or be sued and not to the particular right or rights on which he claims for or resistance to

the relief involved in the suit arising from a cause of action : *Case law Referred.* [Para 21]

Annotation :—('44-Com.) Civil P. C, S. 11, Note 70.

(b) Civil P. C. (1908), S. 11, (Expl. IV)—Suit for possession — First suit based on title by purchase — Second suit based on title on usufructuary mortgage, held barred — Civil P. C. (1908), O. 2, R. 2.

On identical cause of action all different grounds of attack or defence and the whole claim, arising therefrom should be pleaded or claimed, as the case may be, provided the facts, to be pleaded or proved in evidence of all the claims and all the different grounds of attack or defence, are not mutually destructive of each other. [Para 34]

In 1928, *M* executed a mortgage in favour of *T* in respect of Plot 1. In 1929 he executed another mortgage in favour of *S* in respect of plots 1, 2 and 3. In 1931 *M* executed another usufructuary mortgage bond in favour of *P* in respect of plots 1, 2 and 3 of which *P* was put in possession. In February 1934 *M* executed a sale in favour of *D* in respect of plots 1 and 2. *M* executed in March 1934, another sale deed in favour of *P* in respect of plots 1, 2 and 3. *P* was dispossessed in 1937 by *D* on the strength of his purchase. *P* instituted a suit for possession on the strength of his purchase. The suit was dismissed on the ground that *D* was entitled to possession on account of his prior purchase. *P* instituted another suit for ejectment of *D* as trespasser. In this suit *P* based his claim on the usufructuary mortgage bond of 1931 :

*Held*, (i) that the cause of action in this suit was the same as in previous suit. [Para 9]

(ii) that *P* was litigating under the same title in both the suits. [Para 34]

(iii) that therefore the suit was barred by constructive res judicata under S. 11, Expl. IV : *Case law discussed.* [Para 34]

Annotation:—('44-Com.) Civil P. C., S, 11, Notes 33, 34 and 35.

*Cases referred* :—

1. (1837-41) 11 M. I. A. 50 : 2 Sar 212 (P. C), Peria Odaya Taver v. Katama Natchair.
2. ('73) 11 Beng. L. R. 158 (P. C.), Woomatara Debia v. Unnopoorna Dassee.
3. ('84-85) 12 I. A. 116 : 8 Mad. 520 (P. C.), Rajah of Pittapur v. Venkata Mahipatisurya.
4. (1837-41) 11 M. I. A. 551 : 2 Suther 59 : 2 Sar 259 (P. C.), Moonshee Buzloor Ruheem v. Shumsoonnissa Begum.
5. ('07) 34 I. A. 72 : 29 All. 331 : 10 O. C. 117 (P.C.), Deputy Commr. Kheri v. Khanjan Singh.
6. ('14) 41 I. A. 142 (P. C.), Payana Reena Saminathan v. Pana Lana Palaniappa.
7. ('93) 20 Cal. 79 : 19 I. A. 234 : 6 Sar 241 (P. C), Kameswar Pershad v. Rajkumari Puttan Koer.
8. ('23) 46 Mad. 135 : 10 A. I. R. 1923 Mad. 257 : 72 I. C. 207 (P. C.), T. S. N. Muhammad Rowther v. M. M. Abdul Rahaman.
9. ('37) 24 A. I. R. 1937 Cal. 57 : 166 I. C. 996, Kamaruddin Saha v. Sk. Diljan.
10. ('21) 2 P. L. T. 285 : 8 A. I. R. 1921 Pat. 326 : 60 I. C. 393, Raman Chaubey v. Bacha Missir.
11. ('19) 52 I. C. 813 : 6 A. I. R. 1919 Mad. 743, Manglathammal v. Virappa Goundan.
12. ('18) 5 A. I. R. 1918 Pat. 275 : 47 I. C. 141, Teju Bhagat v. Deoki Nandan Prosad.
13. ('30) 17 A. I. R. 1930 Cal. 588 : 128 I. C. 96, Rajani Kanta v. Arjun Chandra.
14. ('30) 17 A. I. R. 1930 Mad. 539 : 127 I. C. 126, Pachan v. Kunhandi.
15. ('11) 35 Bom. 507 : 12 I. C. 387, Mahomed Ibrahim v. Hamja Mahomed Ally.
16. ('03) 26 Mad. 760, Ramaswami Aiyar v. Vaithinatha Ayyar.
17. ('24) 11 A. I. R. 1924 Pat. 624 : 83 I. C. 951, Lish v. Lish.
18. ('84) 8 Bom. 174 (F. B.), Girdhar Manor Das v. Dayabhai Kalabhai.

*S. N. Haque for Ahmed Rasa*—for Appellant.
*K. K. Sinha and H. K. Banerji*—for Respondents.

**Ray J.** — This is a defendant's (1st party) second appeal preferred in a suit instituted by the respondents for recovery of possession of 2 plots of lands consisting of survey Nos. 137 and 375 with an area of 13 kathas 2 dhurs. The above-mentioned survey plots together with survey plot No. 515 appertain to khata No. 51 bearing an area of 19 kathas, 10 dhurs. The plaintiffs also claimed for recovery of mesne profits of Rs. 174-12-0 for the period beginning with the date of dispossession.

[2] The aforesaid 19 kathas, 10 dhurs of land originally belonged to Matai Tanti. On 24th April 1928, Matai executed a mortgage (sudhbharna) in favour of Turanti Lal Sao in respect of survey plot No. 137. On 12th June 1929, Matai executed another mortgage (sudhbharna) in favour of one Sudam Sao in respect of plots Nos. 137, 375 and 515. On 5th February 1931, Matai executed another usufructuary mortgage bond in favour of the plaintiffs-respondents in the name of plaintiff 2 in respect of plots Nos. 137, 375 and 515. The mortgagor put the plaintiffs into possession over the lands on 22nd February 1934, Matai executed a sale deed in favour of the appellant Shaikh Goswar Ali (defendant 1st party) in respect of survey plots Nos. 137 and 375. Lastly, on 5th March 1934, Matai executed another sale deed in favour of the plaintiffs-respondents in respect of the three plots 137, 375 and 515.

[3] In November 1937, defendant 1st party dispossessed the plaintiffs from the disputed lands (survey plots 137 and 375) on the strength of his purchase of February 1934. The plaintiffs approached the criminal Court for a proceeding under S. 144, Criminal P. C. The result of that proceeding, however, went against them. They, therefore, had to file Title Suit No. 203/38 claiming title to and recovery of possession of the disputed lands on the strength of their title by purchase in March 1934. The plaintiffs had also claimed recovery of mesne profits from the date of dispossession.

(4) The defendant 1st party resisted that suit in ejectment, on two grounds, namely, that they had acquired title by purchase in February 1934, a purchase prior to that of the plaintiffs, and alternatively on the ground of his having subrogated to the position of Sudam Sao a prior usufructuary mortgagee in respect of the disputed lands the mortgage being of June 1929. In

order to deal with the contentions of the respective parties, it has to be borne in mind that the real question at issue between the parties in that suit centred round priority or otherwise of the conflicting claims of the respective parties. Set in this background it can be easily conceived whether or not the priority claim based upon the usufructuary mortgage in favour of the plaintiffs in the year 1931 should or should not have been a ground of attack against the act of dispossession of the defendants. The question of priority right of possession claimed by the defendant 1st party was declared to be unsubstantial by the Court below on the ground that Sudam Sao's mortgage had never been given effect to, nor the sale but in the ultimate Court of appeal it was held in favour of the defendant 1st party that he had acquired a title by purchase by the sale deed of 22nd February 1934, and was, therefore, entitled to obtain and continue in possession of the disputed properties (survey plots Nos. 137 and 375). The plaintiffs, therefore, lost their suit instituted for the purpose of establishing that the defendant 1st party was a trespasser as against them and failed to recover possession and mesne profits from the defendant 1st party. Hence, the present suit by the plaintiff's out of which the second appeal arises.

[5] The plaintiffs' present suit is also a suit in ejectment of the defendants as trespassers with recovery of mesne profits against them, the alleged cause of action being the same act of dispossession in November 1937, by defendant 1st party and termination of the possessory proceedings in the criminal Courts in their (that is, defendants') favour. But the plaintiffs based their present title to recover possession and mesne profits on the usufructuary mortgage of 5th February 1931, and the possession that they had obtained and continued to be in, on the strength of the mortgage, till the date of dispossession.

[6] The defendant 2nd party is Matai Tanti, the original owner of the properties in suit. The defendant 1st party-appellant urges that the present suit, or at least, the material issue on the determination of which the plaintiffs can obtain a decree in their favour is barred (1) by the principle of constructive res judicata being a matter which might and ought to have been made ground of attack in the former suit, just referred to, and which shall, therefore, be deemed to have been a matter directly and substantially in issue in such suit (S. 11, Explanation 4, Civil P. C); and (2) by the principles of Order 2 Rule 2 (1) and (2). I propose to quote, for the purpose of ready reference, the relevant portions of the provisions just referred to:—

S. 11 : "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating *under the same title*, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation IV : "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Order 2, R. 2 (1) : "Every suit shall include *the whole of the claim* which the plaintiff is entitled to make in respect of the cause of action; but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so, omitted or relinquished."

[7] In short, the question is whether the plaintiffs in their previous suit should have made it an alternative ground of attack that in case the defendant's earlier purchase was found to be real, he should be held entitled, by virtue of his prior usufructuary mortgage of the year 1931, to recover possession in the same manner, as in his said suit the defendant 1st party had raised an alternative ground of defence that in case his purchase did not prevail, he would be entitled to retain possession of the land as subrogee-the position acquired by him on his redemption of the mortgage of 1929. It has also to be considered whether this alternative ground of attack is a matter which not only might have been but ought to have been, in the circumstances of that case, raised. Further question that arises for consideration is whether the plaintiffs should be taken to have been litigating in the previous suit under the same title as in the subsequent suit.

[8] In adjudging the applicability of O. 2, R. 2 it has to be seen whether the above ground of attack is included within "the whole of the claim" contemplated in the rule, and whether the claim is one which the plaintiffs were entitled to make in respect of "the cause of action" for the previous suit.

[9] Before proceeding further, one thing, however, is clear beyond all possibility of doubt that "the cause of action" that led the plaintiffs to bring the previous suit is identically the same which is the cause of action for the present suit. It is the identical act of dispossession by the defendant 1st party, and the upholding of the defendants' possession in the proceeding under S. 144, Criminal P. C., that was taken recourse to rectify the said act of dispossession. It has been faintly argued that the failure of the previous suit is the cause of action for the subsequent suit. I cannot accede to this contention. The cause of action arises when one party infringes the right of, or disowns the obligation due to, another party. If the defendant 1st

party infringed the plaintiffs' right or failed to discharge the obligation which he was under in relation to the plaintiffs' right to the property, it was by his act of dispossession and not by his successful defence in the previous suit. The plaintiff's failure in the previous suit amounts to denial to them of a particular remedy by the Court which they thought they were entitled to under the circumstances of that case. The plaintiffs in the present suit claim recovery of possession impugning the defendant's act of dispossession as an act of trespass, and claiming the same mesne profits as they did in the previous suit. Whether the cause of action is the same or different is a question of fact, and I do not find that the cause of action of the present suit has been based upon any facts different from or other than the facts that made up the cause of action in the former suit. I have no hesitation in pronouncing that the causes of action for both the suits are the same and identical.

[10] It has not been contended, nor could it be contended with any hope of success, that the ground of attack in the present suit might not have been a ground of attack in the previous suit, but what is argued against the applicability of S. 11 Expl. IV and R. 2 of O. 2 is that such a ground of attack or such a claim is not one which the plaintiffs ought to have made or were entitled to make a claim of, or a ground of attack in the previous suit. The argument in substance is that the claim of right to possession based on purchase is antagonistic to or destructive of the claim based on the prior mortgage and hence it ought not to have been made a ground of attack or claim. This argument is fallacious in view of the provisions of S. 101, Transfer of Property Act. Such a contention could have been advanced under the section in its pre-amended form under which the very act of purchase by the holder of the charge, or the encumbrance of the property without anything more would extinguish the mortgage, but the section in its amended form makes it clear that one can at the same time be a mortgagee and or a transferee of the rights of the mortgagor. In this view of the matter, there would have been no repugnancy, nor any confusion, for the plaintiffs to have said in the previous suit that they were in relation to their right to possession of the lands, owners of the absolute right to the property or mortgagees thereof, and that they were entitled to recover possession in any one or more of their such rights without any prejudice to their case. I, therefore, cannot see any force in the contention that such a claim as is deducible from their position as mortgagees ought not to have been made, or that they were not entitled to make, in the previous suit.

[11] Next, it is contended that the plaintiffs in the present suit are not litigating under the same title as they were doing in the previous suit inasmuch as then they sued as owners and now they sue as mortgagees. In this contention the word "title" occurring in S. 11 of the Code is sought to be interpreted in a very limited sense. A lot of authorities have been cited in support of, as well as in opposition, to this contention and I well proceed to deal with them presently, one after the other-

[12] In 11 M. I. A. 50[1] the facts were that on the death of the zamindar, the original proprietor of Shivagunga, the question arose whether he was undivided in estate with his brother and whether the zamindary was to pass as an undivided or divided estate. A document was produced in which the zamindar made a testamentary gift of the estate to the appellant's father. In the suits that were brought and came ultimately before the Privy Council in 1844 the exact issue whether the family was divided or undivided had not been so raised as to become necessarily a subject of judicial determination. The issue, however, of the validity of the alleged testamentary paper had been raised and the decision of the Sadar Court was against it. When the case came before the Privy Council in 1844, they held that the question of validity of any devise could not be determined until there was a judicial determination upon the point whether the family was divided or undivided. The Privy Council remitted the case pointing out the necessity of such a decision. In accordance with the direction of the Privy Council, the respondent before their Lordships' Court filed a suit for recovery of the zamindary raising the question of forgery or genuineness of the testamentary paper very distinctly. The present appellant in his answer to it through his guardian did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property, the brothers were undivided. When the suits came before their Lordships of the Privy Council, they were of opinion that the zamindary in question was self-acquired property of the last male holder, and thus the question of division or no division was after all immaterial. They accordingly held that the estate was capable of being devised, and the law applicable to the undivided property not being applicable thereto, it descended to the heirs generally. The determination of the question with regard to the validity of genuineness of the testamentary paper became immaterial in view of the stand taken by the appellant in relation to that document namely, that it was a document amounting to a declaration of opinion of the last proprietor that the zamindary was in reality an

undivided property. After having lost in that suit, the appellant instituted the present suit founding his claim on this testamentary paper as a devise of the estate and insisting upon it as being a valid will and testament. Their Lordships held that the plaintiff-appellant's suit was barred by the rule of *res judicata*. Their Lordships reasoned in the following manner:

"In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that, therefore, the plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward."

There Lordships, therefore, held that the thing (the validity or genuineness of the will and the claim based upon it) must be held to have been in issue in the previous suit, and that what was in issue must be taken to have been decided by the judgment against the plaintiff-appellant.

[12a] In 11 Beng. L. R. 158[2] S. 2 of Act 8 (VIII) of 1859, (Civil P. C.), came up for interpretation by their Lordships of the Privy Council. The section read:

"The civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

The facts of the case, in short, were that the plaintiff filed a suit for recovery of possession by the defendant. She based her title to the land in suit on the ground that it was *taufir* land. She lost the suit. She brought a fresh suit claiming the same land as property belonging to her talook according to the true boundary line. The question arose whether both the suits were based upon the same cause of action, and their Lordships held that as it was the same act of dispossession, and the result of certain proceedings culminating in a decision of the Judge in the Act IV case by affirming the possession of the defendants in the land, leaving the party who felt aggrieved to her remedy by a civil Court; the cause of action for both the suits was held to be the same and identical. The mere fact that the first suit was lost was not considered to give rise to a different cause of action. The learned counsel for the respondent before us has advanced a similar contention to the effect that the dismissal of the previous suit of his was the cause of action for the subsequent suit. This contention must receive the same fate as a similar contention received in the case before their Lordships of the Privy Council. To an argument that the plaintiff having advanced a claim that the lands were acquired as *taufir*, that is, by gradual squatting or encroachment, any claim on the basis that they formed a part of their original *talook ought not to have been advanced* in that suit, their Lordships observed that it was open to the plaintiff in the former suit to shape her title in either of three ways, namely, that the whole of the land then claimed was *taufir* land, or a portion of the land fell within the talook, and the residue of it was *taufir* land, or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that should the proof of that fail, that portion also was to be considered as *taufir* land. With these observations, their Lordships held that the case was within the principle and letter of the section under consideration, and that the suit in question was barred by *res judicata*. In doing so, their Lordships thought it desirable to remark that the principle of their Lordships' decision in this case was almost identical with that laid down in the judgment of Lord Westbury in 11 M. I. A. 50,[1] already referred to.

[13] The case in 12 I. A. 116 [3] affords an instance in which a claim not arising out of the same cause of action may not be made a ground of attack or defence in the previous suit. In that case an estate consisting of immovable properties and personalty had been devised under the will of the last holder. The defendants applied to have the estate (the immovable properties) registered in their name and succeeded. The plaintiff thereupon sued for cancelment of the registry and recovery of possession of the lands out of which the defendants had improperly turned them out. The defendants succeeded in establishing their title under the will, and, later, instituted another suit for recovery of the personal properties. Their Lordships relied upon a decision in 11 M. I. A. 551[4] and held that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit. Addressing themselves to the facts of that particular case, their Lordships held that it was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action. As there was no attack by the defendants upon the plaintiff's title to the personal properties at the time of the previous suit,

it was not necessary for him to include his claim with regard to the personal properties in that suit. According to their Lordships' view, it is not necessary that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action — meaning the cause of action for which the suit is brought.

[14] The point that clearly stands out, from a consideration of these decisions, is that where the cause of action is one and identical, the whole of the claim arising out of that must have been included or must be taken to have been included in the former suit however inconsistent the several standpoints of the claim may be.

[15] In 34 I. A. 72 [5] it was held that a suit by a reversioner for enforcement of his right of pre-emption in respect of a property sold by the widow ought not to have included his claim, as a ground of attack, to have the sale set aside as being not binding against him after the widow's death as the two claims are incongruous to each other, and the last claim is one which ought not to have been made a ground of attack within the meaning of S. 13, Civil P. C., 1882.

[16] The case in 41 I. A. 142 [6] was a case before the Board of the Judicial Committee from Ceylon. Section 34, Ceylon Civil P. C., is identically the same as O. 2, R. 2, Civil P. C. In construing the section it was observed by their Lordships :

"It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction".

[17] In 20 Cal. 79,[7] a widow charged her widow's estate with payment of a certain debt; and afterwards surrendered the same to the next reversioner on condition that he should pay all her debts. During the lifetime of the widow the creditor sued the widow and the reversioner for recovery of the debt. The cause of action for the suit was that the property in the hands of the reversioner was liable for the debts. The suit was dismissed against the reversioner. In a subsequent suit, he sued the reversioner again on the ground that on taking the surrender of the estate from the widow, he had agreed to become responsible for the debts. It was held that this latter claim might and ought to have been made ground of attack in the former suit within the Expln. 2 of S. 13, Civil P. C., 1882 and must accordingly be deemed to have been directly and substantially in issue in the former suit, and, therefore, their Lordships observed:

"That it 'ought to have been' appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit, and therefore, that it should be 'deemed to have been a matter directly and substantially in issue' in the former suit and is res judicata."

[18] In 46 Mad. 195,[8] the plaintiff claimed a certain share in a certain property on the ground that he was a cosharer of the deceased. He lost the suit and in a subsequent suit claimed a share in the property as his heir. It was held that the subsequent suit was barred by res judicata. The apparent inconsistency between the two claims was not considered sufficient to make them incongruous for the purpose of their inclusion in the same suit as alternative grounds of defence or attack.

[19] In A. I. R. 1937 Cal. 57,[9] the provisions of O. 2., R. 2, Civil P. C. came up for consideration. In that case A gave two mortgages of two items of properties to B. Later, he entered into a contract for sale to B of the properties in consideration of the money, due under the mortgages plus some money paid in cash. It was stipulated that in the event of cancellation of the contract, mortgage dues will be recoverable. The contemplated event took place. B maintained a suit for recovery of the sum paid in cash at the time of the contract and secured a decree. Later, he sued for the mortgage money. It was held that the suit was barred under the provisions of R. 2 of the Order, because the claim of the later suit arose out of the same cause of action and should have been included in the first suit.

[20] In 2 P. L. T. 285,[10] it was held that the claims, however inconsistent, ought to be advanced alternatively in the suit unless they are so incongruous and dis-similar that the facts supporting them are mutually destructive. This view was based upon the meaning attributable to the words "ought to have been", occurring in explanation (4) of S. 11, Civil P. C.

[21] The learned counsel for the respondents has relied upon certain decisions to be noticed presently in support of his contention that the plaintiff's claims, as owner and his claim as mortgagee of the disputed property, could not be included in the former suit as they constituted different *titles*, under which the plaintiff litigated in each of the suits. This argument overlooks the fact that in both the suits he claimed that he had "the right to possess". How he comes to possess it may have to be supported on several and different grounds. At best, it can be said that he was *litigating different titles*, one mortgagee's title, and the other purchaser's title, but this is quite distinct from "litigating under

the same title". In each of the two suits he was litigating in his individual capacity, for his own self and in his own interest. It is only when the plaintiff or the defendant, as the case may be, sues or is sued in several suits as different legal persona, the personality having (has?) reference to his capacity to sue or be sued and not to the particular right or rights on which his claims for or resistance to the relief involved in the suit arising from a cause of action. The distinction can be illustrated by the position that one occupies as a trustee or as a guardian as distinguished from the one he occupies for his own self.

[22] The difficulty arises out of some learned Judges having expressed themselves too widely employing the terms "different titles" to mean "different sources of right, title and interest". The simple answer to such method of reasoning is if the Legislature meant the word 'title' to mean a particular ground of attack or defence as distinct from another, there would be no meaning in enacting explanation (4) to S. 11. The section with the explanation contemplates a party litigating under the same title but having several grounds of attack or defence advanced in support of various claims converging to one relief or reliefs.

[23] In such circumstances the circumspect enjoined by Lord Dunedin in the well-known passage, quoted below, may be kept in view. The passage is :

"It is well, I think, in considering the cases, which are numerous to keep steadily in mind, that the question to be answered is always the question, arising upon the very words of the statute. It is often useful in striving to test the fact of a case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words ..... A test embordered in certain phrase is put forward and only put forward by a Judge in considering the facts of the case before him. The phrase is seized on and treated as if it afforded a conclusive test for all circumstances with the result that a certain conclusion is plausibly represented as resting on authority, which would have little chance of being accepted if tried by the words of the statute itself."

Bearing these observations in mind, I shall now proceed to examine the cases cited to lend apparently support to the respondent's contention at the Bar. The cases cited are 52 I. C. 813;[11] A. I. R. 1918 Pat. 275 ;[12] A. I. R. 1930 Cal. 588 ;[13] A. I. R. 1930 Mad. 539 ;[14] 35 Bom. 507 ;[15] 26 Mad. 760 ;[16] A. I. R. 1934 Pat. 624 ;[17] 8 Bom. 174 ;[18] 34 I. A. 72[5] and 41 I. A. 142.[6] None of these cases are of any assistance to the respondents in consideration of the special features of this case.

[24] In 34 I. A. 72[5] which has already been noticed by me in one of the previous paragraphs, the subsequent suit for setting aside a sale by a reversioner on the death of the widow was based upon a cause of action entirely different from his previous suit for enforcement of his right of pre-emption of the property sold by the widow and both the claims were incongruous. It has, therefore, no application to the present case.

[25] The case in 41 I. A. 142[6] had, for its consideration a provision of the Ceylon's Civil Procedure Code identical with that of O. 2, R. 2, Civil P. C., and it was there held that the provisions did not require inclusion in one and the same action of different causes of action.

[26] In 52 I. C. 813,[11] plaintiff's claim, for ejectment of the defendant based upon a contractual relationship of landlord and tenant was held to constitute a different cause of action from his claim in the subsequent suit, based upon his title as one of the heirs of the last male owner, even though his title as heir had accrued at the time of the first suit. Sadasiv Iyer J. concurred in the leading judgment of Spencer J. with the observation "I am constrained with reluctance to hold that the present suit is not barred by *res judicata* by the decision in the former suit." The decision of this case was influenced, in a large measure, by the meaning, attributed by the learned Judges to the expression "cause of action" and by the view that they took of the facts in support of two claims being mutually destructive. Sadasiv Iyer J. at p. 817, said that it was to be kept in view whether it was practicable to advance the grounds of attack in the first suit by alleging the facts put forward in the second suit without the evidence adducible in support of them being mutually destructive. There is no controversy, however, that in the present case the cause of action in both the suits is one and identical and, further, that the evidence, in support of the alternative grounds of attack, was at all, mutually destructive.

(27) A. I. R. 1918 Pat. 275[12] has no application to the present case, as explanation (4) of S. 11, Civil P. C. was not invoked and, besides, a suit for recovery of handnote dues and a suit for damages of malicious prosecution were considered to be based upon different causes of action, and, further an issue, whether the handnote is genuine, was different in tenor from the issue whether the said handnote was forged by the plaintiff or had been known to him have been forged within the knowledge of the defendant. Reliance is sought to be placed upon an expression of opinion by Mullick J. that the plaintiff was not litigating under the same title in the first and subsequent suits, but this expression must be understood with reference to the particular facts of that case and should not be considered as laying down a general proposition as to what 'title' means.

[28] In A. I. R. 1930 Mad. 539[14] the ground of attack of the subsequent suit had been pleaded

as a ground of defence in the previous suit, but it was left open by the Court. The question of constructive res judicata did not arise for consideration.

[29] In 35 Bom. 507,[15] it was laid down whether ground of attack or defence in a subsequent suit ought to have been pleaded in the previous suit must depend on the facts of each case. It was, further, held that the test is whether the matters in the two suits are so dis-similar that their union might lead to confusion. On the facts of that particular case, the learned Judges have held that the matters in the two suits were incongruous and might have led to confusion.

[30] The decision in 26 Mad. 760,[16] proceeded upon the ground that S. 13 (Expl. II), Civil P. C. 1882, did not require that all different causes of action should be included in one suit and that the requirement that the grounds of attack or defence in the subsequent suits *ought to have been* the grounds of attack or defence in the previous suit will exclude inclusion of dissimilar and incongruous facts whose union might either lead to confusion or prove mutually destructive.

[31] In A. I. R. 1930 Cal. 588,[13] the subsequent suit to eject the defendant on the ground of termination of the tenancy following notice to quit was held not res judicata on account of plaintiff's failure to obtain a decree of ejectment of the defendant on the ground (i) that the causes of action of two suits were different, and (ii) that the facts in support of the claims in the two suits were incongruous and their combination impracticable.

[32] In A. I. R. 1924 Pat. 624,[17] the plaintiff, on account of certain statutory provisions, was considered occupying as two different status or legal characters in legal sense, in the context of the facts of that case, in the two suits under consideration.

[33] In 8 Bom. 174[18], on the particular facts of that case the majority of the Full Bench held that the causes of action of two suits were different while Melvill, J. dissenting held that there was unity of cause of action in the two suits and hence the second suit was res judicata.

[34] On a review of the authorities, noticed above, it is quite plain that, however much the decisions might differ to all appearances, there is unanimity in the underlying principle to wit on the identical cause of action all different grounds of attack or defence and the whole claim, arising therefrom, should be pleaded or claimed, as the case may be, provided the facts, to be pleaded and proved in evidence of all the claims and all the different grounds of attack or defence, are not mutually destructive of each other. As I have shown above, the facts of the present case do not exhibit any such feature and the first suit was based upon the same cause of action as second. The later suit, therefore, is barred by res judicata under the provisions of S. 11 (Expl. IV), Civil P. C. and is also barred by the provisions of O. 2, R. 2, Civil P. C. In the result, the appeal is allowed, and the plaintiff's suit is dismissed with costs throughout.

**Meredith J.**—I agree.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 309** *[C. N. 110]*

AGARWALA Ag. C. J. AND AYYAR J.

*Padamraj Jain—Petitioner* v. *Emperor.*

Criminal Revn. Petn No. 605 of 1947, Decided on 25-9-1947, from order of Second Addl. Sessions Judge, Patna, D/- 20-5-1947.

(a) Essential Supplies (Temporary Powers) Ordinance (18 [XVIII] of 1946), S. 5—Words "by whatever authority" include Provincial Government.

The words "by whatever authority" are certainly wide enough to include the Provincial Government and must be so construed unless repugnant to the context in which they appear. [Para 2]

(b) Essential Supplies (Temporary Powers) Act (1946), S. 17 (2) and (3)—Bihar Paper Dealers Licensing Order, 1945 continues in operation despite lapsing of Defence of India Rules.

S. 17 (3) continues the operation of Ordinances the continuance of which had been effected by S. 5 of the Ordinance of 1946, unless such Ordinances had been rescinded. It does not speak of an Ordinance that is deemed to have been rescinded, but only of an Ordinance that has in fact and in law been rescinded. The Bihar Paper Dealers Licensing Order of 1945 was never rescinded, although it lapsed. It was deemed to be an order under S. 3 of Ordinance XVIII of 1946 and its operation was preserved at first by S. 5 of that Ordinance and then by S. 17 (2) of Act XXIV of 1946. [Para 3]

*S. N. Sahay and Ramnandan Sinha*—for Petitioner.

*The Government Advocate*—for the Crown.

**Agarwala Ag. C. J.** — The petitioner has been convicted under Rule 81 (4) of the Defence of India Rules read with S. 5 of the Essential Supplies (Temporary Powers) Ordinance, 1946. The petitioner was licensed under the Bihar Paper Dealers Licensing Order, 1945, to sell papers retail at Pakaur. The offence he has been convicted of committing is selling paper retail at Patna on 16th January 1947. The Bihar Paper Dealers Licensing Order of 1945 was published in the Bihar Gazette on 30th May 1945, and republished with an amendment on 19th July 1946. The order was issued by the Provincial Government in exercise of its powers under Rule 81 (2) of the Defence of India Rules. Those rules having lapsed on 30th September 1946, the Licensing Order also lapsed on that date.

[2] The question for consideration, however, is whether subsequent legislation has had the effect of continuing in operation the provisions

of the Licensing Order despite the lapsing of the Defence of India Rules prior to the date on which the petitioner is alleged to have committed the offence of which he has been convicted. On 1st October 1946, that is to say, on the day following that on which the Defence of India Rules had elapsed, the Provincial Government issued the Bihar Essential Articles (Temporary Powers) Ordinance, 1946. Section 3 of this Ordinance empowered the Provincial Government to regulate or prohibit the production, supply, distribution and transport of essential articles and trade or commerce therein. The phrase "essential articles" is defined in S. 2 (a) as meaning any of the articles specified in the Schedule attached to the Ordinance and any other articles which might be declared by the Provincial Government by notified order to be an essential article for the purpose of the Ordinance. "Notified order" was defined as meaning an order notified in the official Gazette. Section 5 declared that every Order made by the Provincial Government or the Central Government or any other competent authority under any of the provisions of the Defence of India Rules in respect of any of the matters specified in S. 3 which, having been notified in the official Gazette, was in force immediately before the commencement of the Ordinance was to continue in force as if made by the Provincial Government under the provisions of the Ordinance in so far as this could validly have been done by the Provincial Government under the Ordinance. It also declared that any such Order should remain valid until superseded under the provisions of the ordinance, and that all licenses and permits issued under such Order should continue in force. The Schedule to the Ordinance, however, did not specify paper as an essential article. Nor was any notified Order issued with respect to paper within the meaning of S. 2 (a). The Schedule, however, did include all articles the prices of which had been fixed under the Hoarding and Profiteering Prevention Ordinance of 1943. This latter Ordinance does empower the fixing the prices of stationery, which includes at least certain kinds of paper. But in fact no Order was issued under this Ordinance fixing the price of such paper. The Bihar Essential Articles (Temporary Powers) Ordinance of 1946, therefore, did not provide for the continuance of the operation of the Bihar Paper Dealers Licensing Order, 1945. The prosecution, however, rely on an Ordinance issued by the Central Government namely, the Essential Supplies (Temporary Powers) Ordinance, 1946 (XVIII of 1946). This Ordinance defines 'essential commodity' as including paper, and S. 3 (1) empowers the Central Government, so far as it appears to be necessary or expedient for maintaining or increasing supplies of any essential commodity, to provide by a notified Order for regulating or prohibiting the production, supply, distribution thereof and trade and commerce therein. Sub-section (2) provides, that without prejudice to the generality of the powers thus conferred by sub-section (1), an Order made thereunder may provide for regulating licenses or permits for the use or consumption of any essential commodity which, as I have already stated, includes paper. Section 5 provided as follows, leaving out unessential words:

"Until other provisions are made under this Ordinance, any order, whether notified or not, made by whatever authority under rule 80 (b), or sub-rule (2), or sub-rule (3) of rule 81 of the Defence of India Rules in respect of any matter specified in S. 3, which was in force immediately before the commencement of this Ordinance, shall, notwithstanding the expiration of the said Rules, continue in force so far as consistent with this Ordinance and shall be deemed to be an Order made under S. 3, and all licenses or permits issued under any such Order and in force immediately before such commencement shall likewise continue in force and be deemed to be issued in pursuance of this Order."

This Ordinance, which was published in the Gazette of India (Extraordinary) dated 25th September 1946, and which came into force on 1st October 1946, was itself repealed by S. 17 (1) of the Essential Supplies (Temporary Powers) Act, 1946, (Act XXIV of 1946). Sub-section (2) of S. 17, however, provides that any Order made or deemed to be made under the said Ordinance and in force immediately before the commencement of this Act shall continue in force and be deemed to be an order made under this Act and all licenses or permits issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Act. For the removal of doubts sub-s. (3) declares that for the purposes of the said Ordinance, that is to say, Ordinance 18 of 1946 and this Act, and order of the nature referred to in S. 5 of the Ordinance made before the commencement of said Ordinance and not previously rescinded shall be deemed to be and always to have been an order in force immediately before such commencement, notwithstanding that such order or parts of it may not have been in operation either at all or in particular areas. The effect of S. 17 (2) of this Act is to continue in force any order, the operation of which had been continued by Ordinance 18 of 1946. The provisions of that Ordinance, therefore, which fall to be considered are Ss. 3 and 5. Section 5 continues in force any order made by whatever authority under sub-r. (2) of Rule 81 in respect of any matter specified in S. 3 and declares that such order shall be deemed to be

an order made under S. 3. The question is whether the Bihar Paper Dealers Licensing Order, 1945, is to be deemed to be an order made under S. 3. It is contended on behalf of the petitioner that the only orders intended to be kept in force by S. 5 are orders made by the Central Government, or its officers, or subordinate authorities, and that as the Provincial Government is not an officer of the Central Government, or one of its subordinate authorities, orders made by it in the exercise of the powers conferred on it by R. 81 (2) of the Defence of India Rules are not orders deemed to be made under S. 3, even though the subject-matter of the Provincial order be one of those mentioned in S. 3. The words "by whatever authority", according to this construction, do not include the Provincial Government. In my opinion, this construction cannot be supported. The words "by whatever authority" are certainly wide enough to include the Provincial Government and must be so construed unless repugnant to the context in which they appear. The words following them, namely, "under R. 80 (b), or sub-r. (2), or sub-r. (3) of R 81 of the Defence of India Rules" do not support the contention of the petitioner. That rule and those sub-rules confer upon the Central Government and the Provincial Government power to make rules, and upon no other authority. The words "by whatever authority" clearly, therefore, contemplated both the authorities referred to in R. 80 (b), or sub-r. (2), or sub-r. (3) of R. 81 of the Defence of India Rules. The learned advocate for the petitioner referred to sub-s. (3) of R. 3 of Ordinance 18 of 1946 which, he contends, indicates that it was intended to confine S. 5 to matters with which the Central Government was authorised to deal under S. 3 (1). Sub-s. (3) provides that any order made under sub-s. (1) may confer powers and impose duties upon the Central Government or officers and authorities of the Central Government, notwithstanding that it relates to a matter in respect of which the Provincial Legislature also has power to make laws. This sub-section does not confer upon officers and authorities of the Central Government the powers which have been conferred upon the Central Government alone by sub-s. (1), but merely provides that certain officers and authorities may be authorised to exercise powers and that certain duties may be imposed upon them notwithstanding that the subject-matter of the order under sub-s. (1) relates to a matter not exclusively within the legislative competence of the Central Government. This sub-section cannot be construed as in any way explaining what is meant by the Central Government on which alone the powers conferred by sub-s. (1) of S. 3 are conferred.

[3] The next contention is that the Bihar Licensing Order of 1945 should be deemed to have been rescinded on 30-9-1946, when it, in fact, lapsed. This contention is advanced in order to meet the explanation given in sub-s. (3) of the Act of 1946 as to the intended scope of that Act. As I have already set out above it continues the operation of Ordinances the continuance of which had been effected by S. 5 of the Ordinance of 1946, unless such Ordinances had been rescinded. It is, of course, not contended that the Licensing Ordinance of 1945 was in fact rescinded, but it is contended that having lapsed and the Provincial Government having failed to provide for its continuance, it should be deemed to have been rescinded. Section 5, however, does not speak of an Ordinance that is deemed to have been rescinded, but only of an Ordinance that has in fact and in law been rescinded. The Licensing Order of 1945 was never rescinded, although it lapsed. It was deemed to be an Order under S. 3 of Ordinance 18 of 1946 and its operation was preserved at first by S. 5 of that Ordinance and then by S. 17 (2) of Act 24 of 1946.

[4] The result, therefore, is that the questions of law raised on this application fail and the rule must be discharged.

**Ayyar J.**—I agree.

D.S. *Rule discharged.*

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**A. I. R. (35) 1948 Patna 311** *[C. N. 111.]*

RAY J.

*Firm Ishwar Sahu and Puran Sahu and another — Appellants* v. *Mohammad Abdul Ghafoor — Respondent.*

A. F. A. D. No. 197 of 1946, Decided on 10-10-1947 from decision of Sub-Judge, Ranchi, D/- 12-11-1945.

Contract Act (1872), S. 56 — Frustration — Doctrine of—Sale of goods by *A* to *B*—Delivery to be made by *A* to *B* within stipulated time out of consignment lying at railway station — *A* refusing to take delivery of consignment and therefore failing to deliver goods to *B* — Principle of frustration does not apply — *B* is entitled to damages for breach of contract—Contract Act (1872), S. 73.

*A* contracted to sell 400 maunds of mahua to *B* at the rate of Rs. 4-2-0 per maund. *A* took an advance of Rs. 100 and contracted to deliver the goods within 15 days from the date of the contract out of two consignments then lying at a railway station. *A* refused to take delivery of the consignment and consequently the stipulated quantity of mahua was not delivered to *B* within the stipulated time. *B* thereupon brought a suit for recovery of damages for breach of the contract :

*Held*, that the principle of frustration was not applicable to the case and *B* was entitled to recover damages from *A*. The taking of delivery was not a condition precedent to make delivery to *B* and as the goods were not delivered to *B* on account of *A*'s fault in not taking the delivery of the consignment he could not be relieved of his obligation by frustration of contract : 10 A. I. R. 1923 P C 54, *Foll.* [Para 4]

Annotation : ('46-Man.) Contract Act, S. 56, N. 2.

*Cases referred* :—

1. ('20) 58 I. C. 200 : 7 A. I. R. 1920 Pat. 493, Surajmal Marwari v. B. N. Ry. Co.
2. ('23) 47 Bom. 344 : 10 A. I. R. 1923 P. C. 54 : 50 I. A. 9 : 72 I. C. 485 (P. C.), Harnandrai Fulchand v. Pragdas Budhsen.
3. (1863) 3 B. & S. 826 : 32 L. J. Q. B. 164 : 8 L. T. 356 : 11 W. R. 726, Taylor v. Cladwell.

*Lalnarain Sinha and Lakshmi Narain Sinha* — for Appellants.

*L. K. Chowdhuri*—for Respondent.

**Judgment.** — This appeal is preferred by the defendants in a suit for recovery of damages for breach of a contract caused by the defendants' failure to supply certain quantity of mahua to the plaintiff. It is admitted that on 2-1-1943 the defendants contracted to sell 400 maunds of mahua to him at the rate of Rs. 4-2-0 per maund. The goods were at that time lying at the Ranchi B. N. Railway station. The defendants took an advance of Rs. 100 and contracted to sell the 400 maunds out of the two consignments then lying at the station. The date of delivery was stipulated to be within 15 days of the date of contract

[2] The trial Court dismissed the suit holding that it was an agreement to sell specific goods, and the goods without any fault on the part of the seller could not become available for delivery within the time fixed. In this view he exonerated the defendants from their liability for breach of contract, if any. As Mr. Lalnarain Sinha has adopted the reasoning of the trial Court as part of his argument, I should quote a passage from the said judgment :

"His evidence will clearly show that the sale was made in respect to the specific goods that was lying on the station. The contract was to be enforced after the fulfilment of the contingency of taking delivery of the goods from the railway station. That contingency had not arrived before the institution of the suit. Therefore, there is no evidence that the defendants wrongfully neglected or refused to deliver the goods to the plaintiff. Section 4 (4), Sale of Goods Act, runs as follows:

'An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.'

But if the event does not happen the promise cannot be enforced. In this case D. W. 2 has stated in his evidence that the mahua which was lying at the Railway Station was contracted for sale. D. W. 2 has further explained that they believed and hoped that the goods would be delivered within 10 to 15 days from the Railway Station and on this expectation the 15 days' time was inserted in the receipt. The delivery of the goods of the consignments was not taken from the Railway Station on the day the suit was filed, and hence the contract cannot be enforced."

As will appear from the passage above, his view was that time was not the essence of the contract, and its performance was dependent upon the happening of certain events which in his opinion did not happen without any default on the part of the defendants.

[3] The learned lower appellate Court reversed the trial Court's findings. He said :

"It is admitted that the plaintiff had to purchase only 400 maunds (which were contained in only 200 bags) of mahua out of the 800 maunds which had arrived at the Railway station. D. W. 2 has admitted that out of the 400 bags only 50 bags (containing 100 maunds of mahua only) had been changed during the transit. The defendants were therefore perfectly at liberty to take the remaining 350 bags of mahua, if they so liked. There is further nothing on the record to show that the bags had been changed in both the consignments. It may be further noted that it has been held repeatedly that a consignee cannot refuse to take delivery of goods on any plea whatsoever and that all that he can do is that he can have the articles weighed and inspected in presence of people at the time of delivery and he can afterwards sue for any damages which he might have sustained. This view is clear from a decision of the Patna High Court reported in 58 I. C. 200.[1] It is thus clear that the article was not delivered to the plaintiff on account of the fault of the defendants themselves, and therefore, they cannot take up the plea that this was a contingent contract and that because the contingency never happened they are not liable to pay any damages".

He, therefore, held that the defendants were guilty of negligence in not taking delivery of the specific goods in respect of which they had entered into a contract. In taking this view, he found that time was the essence of the contract.

[4] The learned counsel for the respondent has invited my attention to the decision in 47 Bom. 344[2] in which the case mainly relied upon by the learned counsel, namely, the case in (1863) 3 B. & S. 826 [3] has been dealt with. This case lays down a principle which is binding on me. The facts as well as the decision will appear sufficiently clear from the headnote of the case which is quoted hereinbelow :

" By a written contract, dated 26-11-1917, the respondent firm sold to the appellant firm 864 bales of dhoties, as specified, to be manufactured by named Mills, with whom the sellers had contracted for a larger number of bales. The contract provided that the goods, are to be taken delivery of as soon as the same may be received from the Mills; delivery to be caused to be given in full by 31st December 1918.. The sellers delivered only part of the goods, owing to the mills failing to manufacture or deliver to them the balance.

Held, that the buyers were entitled to recover damages from the sellers; the words quoted above as to delivery did not limit the goods to be delivered to those supplied by the Mills in 1918, nor did they make delivery by the Mills a condition precedent, and the sellers were not relieved of their obligation by frustration of the contract, or by any implied condition.

Judgment of the High Court reversed."

The present case on facts seems to be much stronger than the case before their Lordships of the Privy Council. I should, therefore, overrule the contention of the learned counsel for the appellants that the principle of frustration of the contract applies to the present case.

[5] The next point that was argued was that the learned lower appellate Court has not come to any definite finding as to what was the price

of mahua on 17th January 1943, when the contract was to be fulfilled but was broken. The passage in the judgment of the lower appellate Court relevant on the point is :

"It is admitted that on 9th February 1943 the defendants themselves sold mahua to the plaintiff at Rs. 5-8 0 per maund. It is further admitted by D. W. 2 in his cross-examination that the price of mahua in February had increased to 2 to 3 annas per maund. In his examination-in-chief he had said that in January 1943, mahua was selling at the rate of Rs. 4 to Rs. 5 per maund. It is further admitted by the parties that the mahua which had been contracted to be sold was of good quality. I may therefore take it that the mahua which was to be purchased by the plaintiff was at least valued at Rs. 5-2-0 per maund on 17th January 1943 when the contract was to be fulfilled. There is no doubt therefore that the plaintiff has suffered damages to the extent of about Rs. 400, at the rate of Rs. 1 per maund. The plaintiff is further entitled to get back the amount of advance paid by him. The plaintiff, in my opinion, is thus entitled to get a decree for Rs. 500 only from the defendants".

The attack upon the judgment was that it was not clear from the evidence of D. W. 2 which appears to be the basis of the Courts finding what the price of mahua of the same specification as that of mahua contracted for was. The appellate Court writes, referring to the evidence of D. W. 2 in his examination-in-chief, that in January 1943, mahua was selling at the rate of Rs. 4 to Rs. 5 per maund. It is further admitted by the parties that the mahua which had been contracted to be sold was of good quality. I may, therefore, take it that the mahua which was to be purchased by the plaintiff was at least valued at Rs. 5-2-0 per maund on 17th January 1943 when the contract was to be fulfilled. The submission is that D. W. 2's statement that mahua was selling at Rs. 4 to Rs. 5 per maund does not necessarily fix the price at Rs. 5 per maund, and the price according to the witness varying between Rs. 4 to Rs. 5, the defendants will be given the benefit by taking the minimum as the price for extracting the difference for the purpose of ascertainment of damages. This contention, however, which had at first attracted my attention and approbation appears to be far from sound when the statement previous to the statement referred to in the judgment is kept in view. The previous statement was that in the month of January 1943, the price of mahua varied according to quality. The variation as between bad and good quality was as much as Rs. 4 to Rs. 5. In the following sentence the witness stated what the price in the month of February was namely, Rs. 5/8 and what was the increase upon the rate prevailing in January. It being admitted between the parties that the mahua contracted for was of good quality, the Court of appeal below was right in taking Rs. 5 as the price of mahua of good quality. This contention of Mr. Sinha that nothing was proved so as to form a basis of determination of the damages must fail. But the Court of appeal below instead of taking Rs. 5 takes Rs. 5/2 per maund to be the value. In this respect I should consider him wrong. The learned counsel for the respondent says that this figure has been arrived at by deducting the increase in the rate of price in February upon the price prevailing in January. I should, however, consider that if we rely upon the statement of D. W. 2 as an admission, we must rely upon it as a whole. When a definite figure is quoted for the prevailing price in January for mahua of good quality, it would be far from correct to enhance it by a derivative method of calculation. I should, therefore, modify the damages granted proportionately, that is to say, the damages will be calculated by taking the prevailing price to be Rs. 5 per maund instead of Rs. 5/2 as taken by the Court of appeal below.

[6] The appeal, therefore, is allowed in part. The appellants, however, in the circumstances of this case, will pay the costs of the respondent throughout.

K. S. *Appeal partly allowed.*

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**A. I. R. (35) 1948 Patna 313** *[C. N. 112.]*

MANOHAR LALL AND MUKHARJI JJ.

*Kamakshya Narayan Singh Bahadur and others — Appellants v. T. H. Burnett and others — Respondents.*

A. F. O. D. Nos. 127 and 134 of 1942, decided on 26-3-1947, from decision of Addl. Sub-Judge, Hazaribagh, D/-18-6-1942.

(a) Civil P. C. (1908), O. 2, R. 2.—Certificate proceeding is not suit within O. 2. R. 2.

Certificate proceeding is not a suit within the meaning of O. 2, R. 2. Omission of a claim for cess in respect of a certain period in certificate proceedings does not disentitle the plaintiff from instituting a suit for recovery of the same. [Para 11]

Annotation: ('44-Com.).Civil P. C. O. 2, R. 2. N. 36.

(b) Bengal Cess Act (IX of 1880, as amended in 1936), Ss. 5 and 6 — Lease of mine by Court of Wards on behalf of minor ward—Realization of cess for certain period — Assessment on proprietor — Held on facts that realization by collector though irregular was not illegal — Proprietor held was entitled to recover cess from lessee.

A Court of Wards granted a lease of coal mines on terms that the lessee would pay the cess assessed on the proprietor on the royalties received. On the proprietor attaining majority the estate was released in August 1937. Before the estate was released a certificate case had been instituted against the lessee for realization of royalty for the period of 1-6-1934 to 28-2-1937. The certificate dues had been realized. The proprietor instituted a suit on 9-8-1940, for the amount of cess for 1938-39, which had been assessed on the proprietor and realized from him.

*Held* that the realization directly from the owners of cess proportionate in amount to the royalties received by him and from the occupier proportionate to the balance of the net profits left in his hands after the

payment of the royalties, though slightly irregular was not illegal and the plaintiff was entitled to recover the cess for the year 1938-39. Amendment of the Cess Act in 1936 did not affect the position: 33 A. I. R. 1946 Pat 143 and 34 Cal. 257, *Rel. on.* [Para 10]

(c) Limitation Act (1908), S. 6—Lease of coal mine by Court of Wards on behalf of minor proprietor — Suit by proprietor within 3 years of attaining majority for cess for certain period during minority—Suit held not barred — Plaintiff held could maintain suit.

A lease of coal mines was granted by Court of Wards on behalf of the minor proprietor. Lessee was to pay cess assessed on the proprietor on the royalties received. In August 1937, the estate was released to the proprietor attaining majority. On 9-8-1940, the proprietor instituted a suit for recovery of cess for years 1935-36 which had been assessed on the plaintiff and realized from him by the Collector. It was contended on behalf of the defendant lessee that it was the Court of Wards alone who were entitled to bring a suit for recovery of the cess and as they did not do so, the suit by the plaintiff was barred by limitation.

*Held*, that the lease in favour of the defendant must be taken to be a lease in favour of the plaintiff and was not given solely to the manager, Court of Wards and was substantially to the same effect as if given to the plaintiff himself. The suit therefore brought within 3 years of attaining majority was not barred by limitation: 28 Mad. 205 ; 11 A. I. R. 1924 Bom. 468 ; 14 A. I. R. 1927 Bom. 61 and 33 A. I. R. 1946 Pat 143, *Rel. on.* [Paras 15 and 16]

Annotation: ('42 Com.) Lim. Act, S. 6, N. 36.

*Cases referred* :

1. ('45) 24 Pat. 551 : 33 A. I. R. 1946 Pat. 143 : 227 I. C, 504, Kamakshya Narain Singh v. Arjun Lal.
2. ('07) 34 Cal. 257, Manindra Chandra Nandi v. Secretary of State.
3. ('05) 28 Mad. 205, Ramanuja Ayyangar v. Sadagopa Aiyangar.
4. ('24) 11 A. I. R. 1924 Bom. 468 : 80 I. C. 474, Vishnu Narayan Deo v. Keshav Gajanan.
5. ('26) 50 Bom. 831 : 14 A. I. R. 1927 Bom. 61 : 100 I. C. 95, Pandharinath Manikshet v. Ajamkha.
6. ('35) 16 P. L. T. 649 : 23 A. I. R. 1936 Pat. 194 : 158 I. C. 25, Ram Das v. Ram Babu.

*L. K. Jha and S. P. Singh (in No. 127) and S. C. Mazumdar (in No. 134)*—for Appellants.

*S. C. Muzumdar and S. P. Srivastava (in No. 127) and L. K. Jha and S. P. Singh (in No. 134)*—for Respondents.

**Manohar Lall J.** — These two appeals arise out of Suit No. 81 of 1940 instituted by the plaintiff, Raja Kamakshya Narayan Singh Bahadur, for recovery of royalties and cesses together with interests from the defendants in respect of certain coal lands for a number of years. The learned Subordinate Judge has decreed the suit of the plaintiff in part with the result that the plaintiff has filed Appeal No. 127 and two of the defendants have filed Appeal No. 134. These two appeals will be disposed of together.

[2] The facts which have been amply proved are these: On 9-6-1919, the Court of Wards, who were then in charge of the Ramgarh Raj during the minority of the father of the plaintiff and of the plaintiff, granted a lease of 200 bighas of coal lands in village Karmatanr to Mr. Burnett defendant 1, on the stipulation *inter alia* that the lessee will pay royalty and cess on the amount received if assessed on the proprietor on the royalties received. Mr. Burnett was in possession till 9-5-1922 when he transferred his interest to Kaluram Agarwala, defendant 2. Kaluram Agarwala after remaining in possession till 1929 transferred 100 bighas of coal lands on 17-12-1929 to Sreeram Coal Company. Sreeram Coal Company belongs to defendants 2 to 11, and the transfer of 100 bighas is spoken of in the proceedings as if it were a deed of release by Kaluram Agarwala in favour of the company in which he was a partner. The lease-hold lands were then treated as two separate entities from 1929 onwards after the date of this transfer, and the company and Kaluram Agarwala were liable to pay, and paid, separately the dues of the proprietor. On 26-11-1932, Kaluram Agarwala surrendered the remaining 100 bighas to the Court of Wards and paid up all the royalties which were due from him up to that date. The Court of Wards released the management of the estate to the plaintiff on his attaining majority on 10-8-1937, but apparently before that a certificate case had been filed against defendants 2 to 11, namely Sreeram Company for realisation of royalty from 1-6-1934 to 28 2-1937 and the certificate dues were realised. The plaintiff says that he served notice to quit on the defendant company and to all the defendants in October 1938 and March 1940, but the defendants have not given up possession with the result that the plaintiff filed the suit giving rise to these appeals on 9-8-1940 in which he prayed that owing to the non-payment of the royalties from 1-3-1937 to 31-7-1940, the lease of 9-6-1919 stands cancelled and he is entitled to recover possession of 100 bighas from defendants 2 to 11. The plaintiff has also claimed the amount due for arrears of royalty from these defendants. The plaintiff has further claimed from all the defendants cesses which should have been realised by the Court of Wards from the defendants which were paid on his behalf to the Government on the assessment made from the income of royalty. Interest had also been claimed on these two amounts. Originally, the plaintiff had laid a claim for income-tax and interest thereon, but that claim was abandoned at the time of the hearing of the suit. The case of defendant 1, the original lessse was that the plaintiff was not entitled to claim any cess or interest thereon under the terms of the lease and that in any event he was not liable to pay any cess after the date of the transfer by him to defendant 2.

[3] The plea of Kaluram Agarwala, defendant 2, was also to the same effect and further

that all the dues to the estate for the period prior to the assignment by defendant 1 in his favour were paid in full to the Court of Wards and defendant 2 could not be made liable for the dues for that period. His further plea was that when he surrendered 100 bighas to the Court of Wards, it was done on full payment of the dues to the estate, and the plaintiff is bound by the acts of the Court of Wards who did not make any further claim on him. It was also pleaded that the claim for cess not having been made in the certificate case against defendants 2 to 11, the claim in the suit to that extent is barred by the provisions of O. 2, R. 2. Civil P. C.

[4] The plea of the Company was practically the same as that of defendant 2, and their further plea was that when the plaintiff intimated to the Company that the lease stood cancelled and asked for possession, the Company actually gave up possession of the land to the plaintiff and requested him to come and take possession. It is pleaded that thereafter the company is no longer in possession and is not liable for any claim for royalty and cess.

[5] The defendants' case also was that defendant 9 has or never had any interest in the leased property and his name was expunged as a result of an order of the learned Subordinate Judge.

[6] The learned Subordinate Judge has not accepted the defendants' case that the Company gave up possession in 1937 and has come to the conclusion that the plaintiff is entitled to recover cess with interest from defendant 1 for a small item and also a small amount from the Company, defendants 2 to 8 and 10 to 11. He has also held that the plaintiff is entitled to royalty together with interest from the company. He has disallowed the amount of cesses claimed by the plaintiff after the amendment of the Cess Act in 1936 not on the ground that the plaintiff has not paid this sum, but on the ground that the assessment of cess on the plaintiff under the Cess Act was illegal and, therefore, the payment of cess by him was voluntary. The learned Judge has also held that the plaintiff cannot recover cess for the period 1st June 1934, to 28th February 1937, on the ground that the provisions of O. 2, R. 2, Civil P. C.. stand in his way. The plaintiff, therefore, has preferred an appeal with regard to that portion of his claim which has been disallowed, and only two of the defendants have preferred another appeal against that portion of the claim which has been decreed against Kaluram Agarwala and as against the Company.

[7] Claim for royalty—Mr. S. C. Mazumdar on behalf of the defendants gave up possession and draws attention to the letter, Ex. B (17) dated 25th April 1937, in which the Company writes to the Manager of the Ramgarh Estate that the possession of 100 bighas of coal lands in village Karmatanr has already been given up by them in favour of the estate and as such they have no more concern with the same. This letter was evidently in answer to the letter, Ex. B (5) dated 20th March 1937, and its reminder, Ex. B (7), dated 20th April 1937, from the Manager of the Court of Wards to defendant 2 to show cause within a fortnight why 100 bighas of lease land held by Sreeram Company should not be cancelled.

[8] The oral evidence in support of the defendants' case that he gave up possession is the evidence of Kaluram Agarwala himself and of one James Allen. The learned Subordinate Judge has not believed the evidence of these two persons, and we agree with him. Kaluram says in his evidence that after the receipt of the reminder they gave up possession and removed the materials of the huts which had been put up for the use of the coolies. He says that eight or ten days after he sent a reply, Ex. B (17), the mines clerk and the tahsildar of the Raj came and took possession of the land by beat of drums, but the witness added that he heard this from Ganesh Narayan, a shop-keeper and from his own men. Apart from Mr. Allen neither Ganesh Narayan nor any of the men of Kaluram has been examined. In cross-examination he states that excepting the papers filed he has no papers to show that he gave up possession over the coal land and further "After receipt of the reminder slip I gave up possession and informed the Raj accordingly a day or two later. Nobody was present on behalf of the Raj when I gave up possession. I did not write a letter to the Raj on the day I gave up possession." This evidence is also discredited by the notice, Ex. C, given by the General Manager of the Ramgarh Estate on 19th October 1938, asking the defendant to vacate the coal lands and to pay up arrears of royalty with interest up to 30th November 1938. If defendant 2 or the Company had already given up possession, they must have protested to the statement in the notice, Ex. C, and sent a reply stating that they had already given up possession in March and April 1937. This circumstance supports the case of the plaintiff that the defendant's story that they gave up possession cannot be believed.

[9] The evidence of the other witness, James Allen, is equally untrustworthy. He was originally a servant of the Ramgarh Wards Estate and was sued by the plaintiff for recovery of some unauthorised collections. He says he was unemployed on the date of the suit. His evidence cannot carry any conviction. He is coming to depose against his former employer and wants

the Court to believe that he himself took possession on behalf of the estate by beat of drums. He admits at p. 15 of his cross-examination that Kaluram Agarwala was not present at the time of the alleged resumption of possession and that he does not remember the name of any of the office clerks. He also says that he met Kaluram several times after the alleged dakhaldehani but he had no talk with him about his taking possession over the property. For these reasons the finding of the learned Subordinate Judge must be accepted and it must be held that the suit has been rightly decreed for the claim of royalty and the interest thereon against defendants 2 to 8 and 10 to 11.

[10] Claim for cess—The learned Subordinate Judge was in error in holding that the assessment of cess on the plaintiff was illegal and, therefore, the plaintiff could not recover the cess in respect of the year 1938-39. This question was examined by a Division Bench of this Court in 24 Pat. 551[1] where it was pointed out that the amendment of the Cess Act in 1936 did not make any difference whatsoever to the application of the principles enunciated in 34 Cal. 257[2] and that if the Collector had realised direct from the owner cesses proportionate in amount to the royalties received by him and from the occupier proportionate to the balance of net profits left in his hand after payment of the royalties, the realisation was slightly irregular but not illegal. The plaintiff, therefore, is entitled to recover cesses for the period 1938-39 from the defendant company, and I would order accordingly.

[11] With regard to the claim for cess for the period 1st June 1934 to 28th February 1937, the learned Subordinate Judge was also in error in applying the principle of O. 2, R. 2, Civil P. C. That rule enacts that where the plaintiff omits to sue or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. In the present case, the plaintiff never omitted to sue the defendant for the cesses, all that was done was that the Court of Wards filed a certificate case in which they omitted to make a claim for the amount of cess. But certificate proceedings cannot be held to be a suit within the meaning of O. 2, R. 2, Civil P. C. I would, therefore, reverse the decision of the learned Subordinate Judge and hold that the plaintiff is entitled to recover cesses for the year 1935-36 also. It may be added that the plaintiff has not claimed any cess for the years 1928-29, 1933-34, 1934-35, 1936-37 and 1937-38.

[12] Mr. L. K. Jha rightly conceded that he is not entitled to any interest on cesses as there was no contract to pay any interest.

[13] No serious argument could be advanced that defendants 1 and 2 are not separately liable to pay cess for these amounts which have been found due by the learned Subordinate Judge. Mr. Mazumdar on behalf of the defendants raised an interesting argument that it was the Court of Wards alone who are entitled to bring a suit for recovery of cess, and as they did not do so, the suit of the plaintiff was barred by limitation. He relied upon two cases in support of his argument. In 28 Mad. 205[3] a minor sued by his next friend in August 1903, to recover the amount due on a promissory note executed in September 1897, in favour of his mother. It was held that the suit was barred by limitation as the infant son was not the holder or payee or a person entitled to sue upon the note. It will be observed that this was a case under the Negotiable Instruments Act, and the only person entitled to sue was the payee or the holder.

[14] In A. I. R. 1924 Bom. 468[4] it was held that a minor is not entitled to institute a suit on a promissory note taken by the guardian. This again was a suit on a promissory note governed by the Negotiable Instruments Act.

[15] These two cases were considered by the Bombay High Court in the year 1926 in 50 Bom. 831.[5] In this case an instalment bond was executed on 26th June 1916, in favour of two minors represented by their guardian mother by one Anakha Sardarkha. On 6th November 1924, one of the minors having come of age instituted a suit to recover the amount due on the bond himself and for his minor brother. The suit was instituted within three years of his attaining majority. It was contended on behalf of the defendant that the suit was barred by limitation and that the guardian should have instituted the suit within the period of limitation. But it was held that the suit was within time as the bond on its true construction was a document not given solely to the guardian but was given to the minors acting by their guardian and had substantially the same effect as if given to the minors alone. I would respectfully adopt the reasoning of the learned Chief Justice in this case and hold that in the present case the lease in favour of the defendants must be taken to be a lease in favour of the plaintiff and was not given solely to the manager of the Court of Wards and is substantially to the same effect as if given to the plaintiff himself. If the argument of the defendant is accepted it will lead to the somewhat remarkable result that after the estate had been released no suit can be brought upon the royalties due from the defendants. Mr. Jha also relied on 16 P. L. T. 649.[6]

[16] Mr. Mazumdar also argued that as the Court of Wards did not take any proceeding against the defendants with regard to the claim for cesses, the plaintiff on coming of age is barred

from recovering those sums. But this argument was expressly negatived by the Division Bench decision in 24 Pat. 551[1] already referred to. The result is that in my opinion First Appeal No. 127 of 1942 must be allowed to the extent indicated above, and the decree of the learned Subordinate Judge will be varied by allowing the plaintiff's claim for cesses for the periods 1935-36 and 1938-39. But in the circumstances each party will bear his own costs in this Court. First Appeal No. 134 of 1942 must be dismissed with costs.

**Mukharji J.**—I agree.

R. G. D. *Order accordingly.*

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**A. I. R. (35) 1948 Patna 317** *[C. N. 113.]*

BENNETT AND BEEVOR JJ.

*Delo Singh — Appellant* v. *Jagdip Singh and others — Respondents.*

A. F. A. D. No. 1452 of 1944, Decided on 17-4-1947, from decision of Sub-Judge, Monghyr, D/- 8-9-1944.

**(a) Specific Relief Act (1877), S. 42, proviso — Share of judgment-debtors in one of joint family properties sold in execution — Purchaser can sue for mere partition without claiming possession.**

Where, in execution of a decree against some members of a joint Hindu family, a share of the judgment-debtors in one of the joint family properties is sold, a suit by the auction-purchaser for mere partition, without a prayer for possession, is maintainable against the other members of the family : 3 Cal. 198 (P. C.) and 10 Cal. 626 (P. C ), *Rel. on.* [Para 5]

**(b) Hindu law — Partition — Partial partition — Suit for, by auction-purchaser of share of judgment-debtors in one of properties of joint Hindu family is maintainable—Judgment-debtors are not necessary parties to such suit — Property subject to usufructuary mortgage—Suit is not barred—Mortgagee need not be made party.**

Where in execution of a decree against some members of a joint Hindu family, their share in one of the family properties is sold, the purchaser at the auction sale may sue for partition in respect of the one property in which he has purchased a share subject to the possibility that the defendants may claim that other properties should also be brought into the partition. The judgment-debtors are not necessary parties to the suit : *Case law relied on.* [Paras 7, 8]

The existence of a usufructuary mortgage on the property is not a bar to the partition suit, nor need the mortgagee be made a party to the suit. [Para 9]

*Cases referred :—*

1. ('77) 4 I. A. 247 : 3 Cal. 198 : 3 Sar. 730 : 3 Suther 468 (P. C.), Deendyal Lall v. Jugdeep Narain Singh.
2. ('84) 11 I. A. 26 : 10 Cal. 626 : 4 Sar. 510 (P. C.), Hardi Narain Sahu v. Ruder Perkash Misser.
3. ('37) 16 Pat. 491 : 24 A. I. R. 1937 Pat. 514 : 170 I. C. 959, Nand Kishore v. Achambit Kumar.
4. ('20) 24 C. W. N. 749 : 7 A. I. R. 1920 Cal. 991 : 56 I. C. 665, Rewati Raman Basak v. Harish Chandra Basak.
5. ('35) 62 Cal. 655, Tarini Charan v. Debendra Lal.
6. ('16) 23 C. L. J. 231 : 3 A. I. R. 1916 Cal. 891 : 33 I. C. 17, Sris Chandra v. Mahima Chandra.
7. ('06) 28 All. 39, Ram Mohan Lal v. Mul Chand.
8. ('06) 28 All. 50, Ram Charan v. Ajudhia Prasad.
9. ('71) 6 Beng. L. R. 134, Srimati Padmamani Dasi v. Srimati Jagadamba Dasi.
10. ('85) 11 Cal. 396, Koer Hasmat Rai v. Sunder Das.
11. ('44) 1944 P. W. N. 113 : 31 A. I. R. 1944 Pat. 341 : 218 I. C. 65, Harnandan Das v. Muhammad Kalim.

*L. K. Jha, N. K. Pd. (II), S. M. Nandkeolyar and A. N. Chatterji — for Appellant.*

*B. N. Rai and Shyamnandan Pd. Singh — for Respondents.*

**Beevor J.**—This is an appeal by the defendant in a suit for partition. The plaintiffs brought a suit against Phalli Singh, his sons and grandsons on the basis of a handnote and obtained a decree, and on 3-1-42 in execution of that decree they brought to sale and purchased an eight anna share in one property as representing the share of Phalli, his sons and grandsons. The decree in the suit was dated 23-4-40 and the eight annas share, had been attached before judgment on 22-4-39. The defendant-appellant was of the same family as Phalli Singh, and the plaintiffs sued for partition of the eight anna share purchased by them as against the defendant-appellant.

[2] The defendant-appellant contested the suit on various grounds, the main allegation of fact on his behalf being the allegation that there had been a prior partition in the family of himself and Phalli Singh whereby the 16 annas of the property in suit had been allotted to him. On this question of fact, however, the decision of the lower Courts was against the appellant and that decision could not be challenged in second appeal.

[3] Five contentions have been raised on behalf of the appellant: first, that the suit was not maintainable as the plaintiffs had made no prayer for possession; secondly, that the suit was not maintainable as the plaintiffs had not included in their partition suit the entire properties which belonged to the joint family of the appellant and Phalli his sons and grandsons; thirdly, it was contended that Phalli, his sons and grandsons were necessary parties to the suit; fourthly, it was contended that the plaintiffs in execution of their decree could only purchase the right, title and interest of Phalli with or without the interest of his sons and grandsons, and that they could not themselves in their execution proceedings determine the share at eight annas, and that the share must be determined in a suit brought against the family of Phalli and the appellant; and fifthly, it was contended that as the property is in possession of sudharnadars the plaintiffs' suit is not maintainable.

[4] It will be convenient to deal first with the fourth of these contentions. From the time in 4 I. A. 247[1] it has been settled that in the Mitakshara as administered in this province the right, title, and interest or share of a member of a Mitakshara joint family may be sold in

execution of a decree against him even though he may not dispose of his share in the joint estate by voluntary conveyance without the concurrence of his coparceners. It was also stated in that case that the right of the purchaser at the execution sale must be limited to that of compelling the partition which his debtor might have compelled had he been so minded before the alienation of his share took place. It is thus obvious that the decree-holder cannot by specifying a share in his execution proceedings as being that to which his judgment-debtor is entitled to give himself or any other auction-purchaser a right to obtain by partition any greater share from that which his judgment-debtor could have obtained by partition as stated by the Judicial Committee of the Privy Council. In the present case, however, it could not be urged after the finding of the lower Courts that there had been no previous partition that the share in the joint family property or in the village, in which the plaintiffs made their purchase, was at any material time either greater or less than eight annas. It was suggested that the plaintiffs might have purchased merely the right, title and interest of Phalli excluding that of his sons and grandsons, and such a share would certainly be less than eight annas. But the interest of the sons and grandsons can be sold in execution of a decree against the father unless the debt is an immoral one. This is a defence which can be raised by the sons and grandsons, and it appears that Phalli's sons and grandsons were parties to the suit against Phalli as well as the execution proceedings. I, therefore, hold that by their auction-purchase the plaintiffs acquired exactly the same rights as they would have done had they in their execution proceedings put up for sale and purchased "the share or right, title and interest of Phalli, his sons and grandsons" in the village without at that time specifying exactly what that share was.

[5] I now turn to the first of the appellant's contentions. This is based on the proviso to S. 42, Specific Relief Act which runs as follows:

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

Now in the above cited case in 4 I. A. 247[1] and the later decision of the Judicial Committee in 11 I. A. 26[2] even though the purchaser of the right, title and interest of one member of the joint family had obtained possession, the Judicial Committee held that the joint family was entitled to recover possession of the entire property purchased subject to the rights of the purchaser to work out his rights by means of a partition. It seems to me quite impossible in the face of these decisions to suggest that the purchaser at such an auction sale can in a subsequent suit sue for possession otherwise than by means of partition. The plaintiffs have claimed partition and in the circumstances I do not think they could claim any further relief. It may well be that the lower appellate Court was right in requiring the plaintiffs to pay ad valorem court-fee instead of the fixed court-fee for partition on the ground that they were out of possession, but that does not affect the question with which we are now concerned.

[6] It was certainly held by James J., in 16 Pat. 491[3] that the Court should be astute to see that the plaintiffs should not avoid the liability to pay court-fee under S. 7 (iv) (c) or (7) (v), Court-fees Act, merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit. The lower appellate Court has really applied this principle in requiring the plaintiffs to pay ad valorem court-fees. We were referred to the case in 24 C. W. N. 749,[4] a case in which the Court refused to allow a plaint in a partition suit to be amended by adding a prayer for possession, but that was clearly a case in which the plaintiff could have sued for joint possession.

[7] I now come to the second point. It is argued on behalf of the appellant that, as the plaintiffs' right to partition would at most be the right which was possessed by his judgment-debtor to obtain partition, the plaintiffs in their suit must include all the joint family properties, because had Phalli himself sued for partition he would certainly have had to do so. The appellant has referred to para. 368 of Mayne's Hindu Law, Edn. 10, page 500 where it is stated that:

"the alienee's suit for partition must be one for the partition of the entire property and not for partition of any specific interest for he acquires no interest therein and the coparcener who alienated had himself no such interest. He cannot sue for partition and allotment to him of his share of the property so alienated, nor is he entitled to any mesne profits in respect of his share between the date of his purchase and the date of his suit for partition."

The corresponding remarks in Edn. 9, para. 594 at page 716 were, however, not followed by Nasim Ali J. in 62 Cal. 655.[5] The learned Judge in that case held that the purchaser of a small portion of the joint family property is entitled under the law to get a partition only of the land purchased by him, and that in such cases a suit for a partial partition will lie, for to give effect to the contrary view would be to affirm the principle that a plaintiff can institute a suit for partition in respect of property in which he has no interest at all. He also pointed out that although the ordinary rule is that a suit for partition must embrace all properties owned by

the parties thereto, there is also the complementary rule that the suit for partition cannot include properties in which each of the parties does not claim an interest. The latter proposition was set out in an earlier case of the Calcutta High Court: 23 C. L. J. 231,[6] decided by Sir Asutosh Mukherji later Chief Justice of Calcutta, and Roe J., who subsequently became one of the original Judges of this Court. Applying that principle they held that where two properties A and B were jointly owned by X and Y and by mutual agreement X held possession of A while Y of B but no final and definite partition was effected between the parties, and Y, though in possession of B, transferred to Z his one-half share in A, Z was entitled to claim partition as against X. There are two earlier decisions of the Allahabad High Court in 28 ALL. 39[7] and 28 ALL. 50[8] which have a bearing on this question. In the first of those cases it was held that it was competent to the purchaser of a share in two joint family properties to bring a suit for partition of one of those properties without including the other in his suit. This goes much further than the claim of the plaintiffs in the present instance. In the second of those Allahabad decisions, where two brothers formed a joint Hindu family and one of them sold his interest in a portion of the joint family property, it was held that it was competent to the other brother to sue for partition of his share in the property so dealt with without asking also for partition of the remainder of the joint family properties. The facts of that case are really complementary to those now before us. The first of those Allahabad decisions relied on the earlier decision of Phear J. of the Calcutta High Court in 6 Beng. L. R. 134.[9] It seems to me that he has laid down the true principle to be applied in his judgment in that case in the following words:

> "I think that the plaintiff may confine his application to the Court to that particular part of the property which he is desirous of having divided; but then it follows from the view which I have already endeavoured to express so that in a suit so brought, it will always be open to the other parties to show that that part of the property ought not to be divided, or could not fairly be divided without taking into consideration the rest of the property and dividing it also."

The appellant relied on the decision in 11 Cal. 396[10] for the proposition that in a suit for partition the objection that the whole of the joint family property is not included in it is by no means a technical one. The facts of that case involved special questions, but even if the proposition is treated as of general application, it seems to me to be quite consistent with the view that the present plaintiffs might bring their suit in respect of the one property in which they had purchased a share though it would have been open to the defendant to object that partition should not be allowed unless other properties were also brought into partition. No such objection was taken in the written statement in the present suit. It was urged also on behalf of the appellant that the transferee of a share in only one of the joint family properties cannot as against the members of the joint family compel a partition of that property alone. Again I think that this proposition is quite consistent with the view that the plaintiffs may bring their suit in respect of the one property subject to the possibility that the defendant may claim that other properties also be brought into the partition. The result of the principle expressed by Phear J., and quoted above will also have the reasonable result that the choice whether the plaintiff shall be restricted to the particular property in which he has purchased a share, or whether a general partition should be demanded, will lie with the members of the joint family and not with the plaintiff who is a stranger purchaser. In my opinion, therfore, the present suit for partition is maintainable though all the properties of the joint family have not been included.

[8] Turning now to the third point, I think it is quite clear that so long as the suit is restricted to the property in which the share of Phali, his sons and grand-sons has passed to the plaintiffs, those persons are not necessary parties to the suit.

[9] As regards the fifth point, the partition cannot be effective in possession until the sudhbharna is redeemed and the shares allotted on partition must clearly remain subject to the sudhbharna. But as it is not proposed to evict the sudbharnadar or to do anything in the present partition suit which would have the effect of requiring any substitution of property as security for his mortgage dues, I do not think that the existence of this sudbharna or usufructuary mortgage is either a bar to the partition suit or requires that the sudbharnadar should be made a party to the suit. A reference was made on behalf of the appellant in this connection to the decision in 1944 P. W. N. 113,[11] a decision to which I was a party. That was a case in which the holder of an equity of redemption of a usufructuary mortgage, which mortgage covered an undivided share in zamindari property, brought a partition suit against his co-owners. It was found that although he claimed possession through his mortgagees, the mortgagees were not in possession, and it was held that the possession of the co-owners was not his possession so as to entitle him to bring a simple suit for partition. That decision has, to my mind no bearing on the facts of the case now before us,

[10] In my view, therefore, all the contentions of the appellant fail, and I would dismiss this appeal with costs.

**Bennett J.** — I agree.

S.C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 320** *[C. N. 114.]*

MANOHAR LALL AND MUKHARJI JJ.

*Dewaram Tewari — Appellant* v. *Harinarain Tewari and others — Respondents.*

A. F. O. O. No. 404 of 1945, Decided on 6-5-1947, from order of Addl. Sub-Judge, Hazaribagh, D/- 23-7-1945.

Arbitration Act (1940), S. 32— Scope — Section does not abrogate provisions of S. 49, Registration Act (1908) — Award without intervention of Court falling under S. 17 (1) (b), Registration Act, is compulsorily registrable—If not so registered it cannot be enforced in proceedings under Arbitration Act — Registration Act (1908), Ss. 17 (1) (b), 49.

Section 32, Arbitration Act merely, provides that no Court can entertain any independent suit for a decision that a certain award exists or is valid, or to set aside, amend or modify or affect the award in any way otherwise than as provided in the Arbitration Act. But this does not mean that the provisions of S. 49, Registration Act have been abrogated. [Para 13]

In view of the amendment made in S. 17 (2) (vi), Registration Act, by S. 10, T. P. (Amendment) Supplementary Act (21 [XXI] of 1929) by which the words "and any award" have been deleted from that section, an award made without the intervention of the Court is no longer exempt from registration and if it amounts to a non-testamentary instrument purporting to create, declare, assign, etc., any interest of the value of over Rs. 100 in immovable property, it must be registered. Under S. 49, Registration Act an award which is compulsorily registrable if not registered cannot be received in evidence of any transaction affecting such property. The Court cannot, therefore, enforce such an award in proceedings under the Arbitration Act: *Case law referred.* [Paras 4, 5]

Annotation:— ('46-Man.) Arbitration Act, S. 32, N. 1.

('45-Com.) Regis. Act, S. 17, N. 67; S. 49, N. 33.

*Cases referred:*—

1. ('33) 20 A. I. R. 1933 All. 59 : 143 I. C. 423, Bachchan Lal v. Narottam Datt.
2. ('34) 21 A. I. R. 1934 Cal. 815 : 62 Cal. 201 : 153 I. C. 778, Jitendra Nath v. Nagendra Nath.
3. ('38) 25 A. I. R. 1938 Bom. 422 : 177 I. C. 911, Chimanlal Girdar v. Dayabhai Nathubhai.
4. ('37) 24 A. I. R. 1937 Pat. 183 : 15 Pat. 579 : 168 I. C. 115, Badri Chaudhury v. Mt. Chamoa Chaudhrain.
5. ('47) 34 A. I. R. 1947 Mad. 168, Yanadamma v. Venkateswarlu.

*B. C. De and S. K. Mazumdar* — for Appellant.

*Lalnarain Sinha and Lakshman Saran Sinha* — for Respondents.

**Manohar Lall J.**— This is an appeal by a defendant who is aggrieved by the order of the Additional Subordinate Judge of Hazaribagh dated 23-7-1945, by which he has granted a modified decree to the respondents on the basis of an award made without the intervention of the Court.

[2] A number of objections were taken on behalf of the appellant in the Court below as to the validity of the award including the objection that the award could not be enforced as it was not registered. The Subordinate Judge has overruled all these objections, and the only objection which has been seriously pressed before us by Mr. B. C. De on behalf of the appellant is as to the non-registration of the award.

[3] The learned Subordinate Judge dealt with this objection in Order No. 18 which he passed on 9-7-1945 wherein he says that by S. 32, Arbitration Act of 1940, the award is receivable in evidence and that the provisions of the Registration Act cannot apply, otherwise how could the Court consider whether or not the award was validly made?

[4] Section 17 (1) (b), Registration Act, ordains that all non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, shall be registered. In the present case, the award admittedly purports to create, declare, assign, limit and extinguish in present the right, title or interest to immovable property over the value of Rs. 100 and, therefore, prima facie should have been registered.

[5] Before the amendment by S. 10, T. P. (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929) S. 17 (2) (vi) made an exception in favour of any decree or order of a Court and any award. But the words 'and any award' have now been deleted from that section of the Registration Act by the amendment of 1929. The result of this, in my opinion, is clear that an award is no longer exempted from registration and if it amounts to a non-testamentary instrument purporting to create, declare, assign etc. any interest of the value of over Rs. 100 in immovable property, it must be registered. This view was taken by the Allahabad High Court in A.I.R. 1938 ALL. 59.[1] Sulaiman C. J., drew attention in that case to the provision of S. 49, Registration Act, which enacts that a document which is compulsorily registrable, if not registered, cannot be received as evidence of any transaction affecting such property, and accordingly held that the Subordinate Judge should not have acted upon the award and should not have accepted it in evidence, the appeal was allowed from the decision of the Subordinate Judge by which he had passed an order that the award should be filed.

[6] The Calcutta High Court has taken the same view in A.I.R. 1934 Cal. 815.[2] The Bombay High Court in A. I. R. 1938 Bom. 422[3] followed

the Allahabad and Calcutta view and held that an award which comes under S. 17 (1) (b) is compulsorily registrable and if the Court files such an award which has not been registered and makes it a decree of the Court, it acts contrary to the provisions of S. 49, Registration Act. A Division Bench of this Court consisting of Courtney-Terrell C. J., and Fazl Ali J., (as he then was) also came to the same conclusion in A. I. R. 1937 Pat. 183.[4] See also the recent decision of the Madras High Court in A. I. R. 194 Mad. 168.[5]

[7] Mr. Lalnarain Sinha did not contest the correctness of these decisions, but he advanced an ingenious argument. He argued that these decisions undoubtedly laid down the then law correctly, but S. 32, Arbitration Act of 1940, in his submission, has altered the position completely. Section 32 states that

"notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

He argued by drawing attention to this provision that the objection as to want of registration in an award is no longer tenable. He also drew attention to the provisions of Ss. 14, 15 and 16, Arbitration Act, which enable the Court at the request of any party to the arbitration agreement to cause an award to be filed into Court, and after the filing the Court has the power to modify or correct the award and to remit the award to the arbitrators for reconsideration. He laid stress on the submission that the old distinction which was pointed out by the Calcutta High Court between an award through the intervention of the Court (which does not require registration) and an award without the intervention of the Court has now disappeared, as in his submission the award in either case is only valuable where a decree has been pronounced in accordance with the award by the proper Court.

[8] Having considered the various provisions of the Arbitration Act and the Registration Act, I am unable to agree with this argument.

[9] It will be observed in the first place that the provisions of S. 49, Registration Act, have never been amended so as to exclude a private award. The reason why an award made through the intervention of the Court was not compulsorily registrable is that the award by the arbitrators in that case is a part of the proceeding of the Court.

[10] Mr. Lalnarain Sinha did not refer to the provisions of S. 33, Arbitration Act, which enable the party to an arbitration agreement to have the effect of the award determined by making an application to the Court which can decide the question on affidavits or after taking evidence. This section does not refer to the procedure for the filing of an award laid down in S. 31 read with Ss. 14, 15, 16 and 17, but it enables a party to an arbitration agreement or a person claiming under him, if he likes, to ask the Court to decide the question as to the existence or validity of an arbitration agreement or award or to determine the effect of the agreement or the award. Now, the Court can decide the question by affidavit or otherwise only if he can receive the award in evidence, otherwise how can he look at it? There is a clear prohibition under S. 49, Registration Act, preventing the Court from receiving the award in evidence.

[11] The matter may be looked at from another point of view. Supposing the parties to an award are satisfied with it and enter into possession of the property respectively awarded to them and the value is over Rs. 100 and no dispute arises between them, they are not bound to go to Court under the provisions of the Arbitration Act. They are satisfied with the award and they do not want any Court to pronounce a decree in accordance with the award. Has title to the property passed to the parties without the award being registered so that such a party can transfer the title to a third party by sale, gift or otherwise? In my opinion, the answer is clear that no title to immovable property of the value of above Rs. 100 can pass by the award—it is a non-testamentary instrument — without the document being registered.

[12] It was also argued that how could the arbitrators be directed to file an award under S. 14 (2) if the award has been registered and made over to the parties? The answer to this contention is to be found in S. 14 (2) itself, where the party makes an application that the award should be filed in Court, it will be presumed that the award is with the arbitrator, but a special clause also provides that either the award or a signed copy of it may be filed in Court.

[13] To repeat my conclusions, I would only observe that S. 32 merely provides that no Court can entertain any independent suit for a decision that a certain award exists or is valid, or to set aside, amend or modify or affect the award in any way otherwise than as provided in the Arbitration Act. But this does not mean that the provisions of S. 49, Registration Act, have been abrogated. The objection as to the non-registration in the present case is being taken in the course of a proceeding under the Arbitration Act itself. That objection is fatal to the success of the plaintiff because the Court is prevented from even looking at the documents

as it is not registered and, therefore, cannot be received in evidence.

[14] For these reasons, the objection of the appellant is well founded and must prevail. The decision of the learned Subordinate Judge is, however, affirmed regarding the invalidity of the other objections raised by the appellant. But this is of no assistance to the respondent.

[15] The result is that the appeal is allowed and the decision of the learned Subordinate Judge is set aside. In the circumstances each party will bear his own costs in all the Courts.

**Mukharji J.** — I agree.

S.C. *Appeal allowed.*

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## A. I. R. (35) 1948 Patna 322 *[C. N. 115.]*

SHEARER J.

*Medini Kumar*—*Appellant* v. *P. C. Mallick and others*—*Respondents.*

A. F. A. D. No. 276 of 1946, Decided on 1-10-1947, from decision of Sub-Judge, Bhagalpur, D/- 14-11-1945.

(a) Transfer of Property Act (1882), S. 108 (l) — Abatement of rent—Diluvion—Diluvion of portion of tenancy land — Tenant can claim abatement of rent.

Although there is no provision in the Bihar Tenancy Act under which a tenant can claim an abatement of rent on the ground that a portion of the land comprised in his holding or tenure has diluviated, the tenant is entitled to abatement of rent in such a case under the English principle which has been recognised and adopted by the Courts in India : 9 A. I. R. 1922 Pat. 169 and 18 A. I. R. 1931 Cal. 537 (F. B.), *Rel. on.* [Paras 2, 3]

Annotation : ('45-Com.) T. P. Act, S. 108 (l), N. 14, Pts. 37, 39.

(b) Transfer of Property Act (1882), S. 108 (l) — Abatement of rent — Diluvion — Tenant claiming abatement of rent on ground of diluvion of part of tenancy land — Onus is on tenant to show how much land has been lost in this way. [Para 2]

Annotation : ('45-Com.) T. P. Act, S. 108 (l), N 14, Pts. 37 to 39.

*Cases referred* :—

1. ('22) 2 P. L. T. 569 : 9 A. I. R. 1922 Pat. 169 : 6 Pat. L. J. 665 : 63 I. C. 219, Sukhraj Rai v. Ganga Dayal.
2. ('32) 59 Cal. 155 : 18 A I. R. 1931 Cal. 537 : 133 I. C. 577 (F. B.), Arunchandra Singh v. Shamsul Huq.
3. ('93) 20 Cal. 579, Gouri Pattra v. H. R. Reily.

*S. C. Misra*—for Appellant.

*B. N. Mitter and A. K. Mitter*—for Respondents.

**Judgment.** — This second appeal, which is by the defendant, arises out of a suit to recover arrears of rent for the period from 1348 to 1351 Fs. The defendant is a tenure holder, his tenure being described in the record of rights as "Istimarari lekin mukarrari nahin." The rent there recorded as legally payable is Rs. 8-4-3 annually. Admittedly, however, part of the land comprised in the tenure has diluviated and part is covered with sand, and in the years immediately preceding 1348 Fasli, the landlord accepted rent at the rate of 5 annas a bigha. Apparently, this was the rent which under some kind of amicable arrangement between their landlord and themselves occupancy raiyats in the village paid when their land diluviated or was rendered sterile by deposits of sand. In 1348 Fasli and the ensuing years the plaintiff, however, demanded from the defendant the rent legally payable for the tenure on the ground that, in consequence of the amendments which had been made in the Bihar Tenancy Act, tenure holders are no longer entitled to claim an abatement or apportionment of rent.

[2] The learned Subordinate Judge is, of course, correct in saying that there is no specific provision in the Bihar Tenancy Act under which a tenure holder can claim an abatement. In England, however, it has for a very long time been recognised that, as rent is a profit which issues out of the land, then, if a tenant is deprived of a portion of his land by an act of God, such as the incursion of the sea, he is entitled to an apportionment by operation of law. This principle has been recognised and adopted by the Courts in this country, and, among others, by this High Court, *see* for instance, 2 P. L. T. 569.[1] It is, however, also well established that when a tenant claims an abatement of rent on the ground that a portion of the land comprised in his holding or tenure has diluviated the onus is on him to show how much land has been lost in this way. The latest authority on the point which was cited at the bar is 59 Cal. 155.[2] At p. 178 of the report of the decision of the Full Bench Rankin C. J. said :

"If a tenant after diluvion wants to get rid of his landlord's *prima facie* right to the full rent, he may bring his suit for abatement of rent and upon proper proof of the extent of the diluvion his liability will be reduced. If he does not choose this course, then while he can still plead and prove the fact and the extent of the diluvion as a partial defence to a suit for the full rent, he can make no grievance of the fact that the landlord claims it from him. At the one time or at the other it is for the tenant to show what he has lost and that he has been partially discharged from the liability which he assumed as tenant."

[3] Now unfortunately, in this case, the defendant did not adduce evidence to show exactly how much of his land had diluviated. Apparently, he relied on the circumstance that in previous years the landlord had been content to receive rent at the rate of 5 annas a bigha. This, as I have already said, would seem to have been the result of some kind of tacit agreement between the landlord and the tenants. It is, I think, quite impossible to say that there is a valid custom in the village under which the defendant was not liable to pay rent at a higher rate than that. Moreover, while there can, I think, be no doubt but that the defendant was entitled to an abate-

ment of rent in respect of any of his land which had diluviated, I am by no means satisfied that he is also entitled to an abatement of rent in respect of land which has been covered or partly covered with a deposit of sand and thereby rendered less productive. Some reliance was placed on the following observation of Prinsep and Beverley JJ. in 20 Cal. 579[3] at p. 586 :

"No doubt it is only an occupancy raiyat who is authorised by the Act to bring a suit under S. 38, but the principles laid down in that section are clearly to be taken into consideration in all proceedings for the settlement of rent whatever the status of the raiyats."

It has, however, to be remembered that the case with which the learned Judges were there dealing was a case which arose out of proceedings in a settlement where apparently a fair rent was being settled and also that they used the word raiyats and not tenants. It is not necessary for me to decide this point and, as it is one of some difficulty and I have not had the advantage of hearing argument on it, I refrain from doing so. It is enough to say that the defendant did not discharge the onus which was on him to show exactly the extent of the reduction in his rent to which he was entitled. Although therefore, for some different reasons, I would affirm the decree of the lower appellate Court and dismiss this appeal with costs.

G.N. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 323 *[C. N. 116.]*

BENNETT AND BEEVOR JJ.

*Bhuneshwar Prasad Narain Singh — Appellant* v. *Mohan Bikram Sah — Respondent.*

A. F. O. O. No. 260 of 1945, Decided on 30-4-1947, from order of Sub-Judge, Motihari, D/-21-4-1945.

**Limitation Act (1908), Art. 182 (5) — Execution petition by benamidar held enured to the benefit of real owner—Declaration obtained by real owner in civil suit held sufficient to constitute him transferee within meaning of O. 21, R. 16, Civil P. C. — He was held competent to apply for execution — Civil P. C. (1908), O. 21 O. 16.**

*D* obtained a money decree against *J* and applied for execution. During the pendency of the second execution, the decree was assigned to *M* acting as the benamidar of her sister *K* and *M* was brought on the record and the execution petition was dismissed. *K* died in the meantime. On 18-5-1937, a third execution case was instituted by *M*. During the pendency of this case one *R* the heir of *K* put in an application opposing the execution on the ground that *M* was a mere benamidar. This application was dismissed and *R* was referred to the Civil Court. *R* brought a title suit claiming declaration that *M* was only a benamidar with respect to the assignment of the decree and *K* was the real purchaser and on *K's* death the absolute interest under the deed of assignment passed to *R* and that *M* had no right to execute the decree and should be restrained therefrom by permanent injunction. During the pendency of this suit, the third execution case was stayed. On 22-4-1937 *R's* suit was decreed and in consequence, on 31-5-1939 the third execution case was dismissed. On 21-4-1942 *R* instituted the fourth execution case. *J* contended that third execution by *M* did not enure to the benefit of *R* and the decree had therefore become time barred:

*Held*, (i) that the third execution filed by *M* enured to the benefit of *R* and the decree had not become time barred.

No doubt, where two persons claim to execute a decree by virtue of rights which are entirely independent of each other, as, for instance, where each claims to be the heir of the deceased decree-holder, an application for execution by one of them in his own right will not and cannot operate as an assertion of the independent right of the other and so will not enure to the benefit of that other, but where the sole *locus standi* of the one to claim to execute the decree derives solely from the lending of his name to the other, their respective rights to enforce the decree are not independent of each other. A person in the position of a benamidar cannot in law act in relation to the benami property in a manner hostile to the real owner and if he attempts to do so the law will restrain him from so doing and the real owner is entitled to the benefit of a wrong act done by the benamidar in relation to the benami property : (1815) 3 M. & S. 721; 16 A. I. R. 1927 Mad. 268; 35 Cal. 551 (P. C.) and 5 A. I. R. 1918 P. C. 140, *Ref.* [Para 6]

(ii) that the declaration in title suit by *R* was sufficient to consitute *R* a transferee of the decree within the meaning of O. 21, R. 16 and therefore the fourth execution case instituted by him was competent: 25 A. I. R. 1938 Pat. 457 and 31 A. I. R. 1944 Pat. 307, *Disting.* [Paras 7, 9]

Annotaion:—('42-Com.), Lim. Act, Art. 182, N. 78; ('44-Com.), C. P. C., O. 21, R. 16, N. 6.

*Cases referred:*—

1. ('17) 4 A. I. R. 1917 Mad. 2 : 37 I. C. 750. Saminatha Asari v. Gopalakrishna Aiyengar.
2. ('38) 25 A. I. R. 1938 Pat. 531 : 178 I. C. 759, Achutanand Giri v. Saran Singh.
3. ('44) 31 A. I. R. 1944 Pat. 307 : 23 Pat. 410 : 219 I. C. 100, Lalmani Kuer v. Raghubansi Devi.
4. ('38) 25 A. I. R. 1938 Pat. 457 : 17 Pat. 223 : 177 I. C. 992, Mohammad Anas v. Bhupendra Prasad.
5. ('28) 55 M. L. J. 856 : 16 A. I. R. 1929 Mad. 268 : 115 I. C. 340, Pitchayya v. Rattamma.
6. ('08) 35 I. A. 98: 35 Cal. 551: 4 L. B. R. 266 (P. C), Petterperumal Chetty v. Muniandi Servai.
7. ('19) 46 Cal. 566 : 5 A. I. R. 1918 P. C. 140 : 46 I. A. 1 : 49 I. C. 1 (P. C.), Gur Narayan v. Sheolal Singh.
8. (1815) 3 M. & S. 562, Taylor v. Plumer.
9. ('15) 37 All. 557 : 2 A. I. R. 1915 P. C. 96 : 42 I. A. 202 : 30 I. C. 299 (P. C.), Mt. Bilas Kunwar v. Desraj Ranjit Singh.

*B. N. Mitter and K. P. Upadhya* — for Appellant.

*D. N. Varma* — for Respondent.

**Bennett J.** — This is an appeal by the judgment-debtor against an order of the Additional Subordinate Judge, Motihari, dismissing his objection to the execution of a money decree.

[2] The money decree in question was originally passed against the appellant in Suit No. 100 of 1931 at Benares at the instance of one Mathura Das. On 21-8-1932, the decree was transferred to the Subordinate Judge at Motihari for execution. On 28-5-1933 the first Execution Case No. 63 of 1932 was initiated and was dismissed on 22-12-1934, on part satisfaction. On 22-5-1935,

a second Execution Case No. 122 of 1935 was instituted and during the pendency of this execution case on 13-1-1937, the decree was assigned for consideration by a registered sale deed to Maiya Dalip Rajeshwari Devi (hereinafter referred to as Maiya Dalip) acting, as will appear hereafter, as the benamidar of her sister Rani Chhatta Kumari Devi (hereinafter referred to as the Rani) and in January 1937, Maiya Dalip the benamidar was brought on to the record of Execution Case No. 122 of 1935. On 30-1-1937, the real assignee of the decree, the Rani, died. On 5-4-1937, the second Execution Case No. 122 of 1935 was dismissed. On 18-5-1937, a third Execution Case No. 75 of 1937 was instituted by Maiya Dalip. During the pendency of this third Execution Case, Ramraja, the present respondent, put in an application opposing the execution petition on ground that Maiya Dalip was a benamidar of the Rani. This application was dismissed and Ramraja was referred to the Civil Court. In 1937 Ramraja instituted title Suit No. 31 of 1937 in the Court of the Subordinate Judge, Motihari, claiming a declaration that Maiya Dalip was only a benamidar with respect to the deed of assignment of the decree here in question, that the real purchaser was Rani Chhatra Kumari Dei who paid the consideration money, that after the latter's death the absolute interest under the deed of assignment passed to Ramraja and that Maiya Dalip had no right to execute the decree and should be restrained therefrom by permanent injunction. During the pendency of this title suit, Ramraja obtained an order therein staying the proceedings in the third Execution Case No. 75 of 1937. On 22-4-1939, Ramraja's suit was decreed. In consequence, on 31-5-1939, the application in Execution Case No. 75 of 1937 was dismissed. On 21st April 1942, Ramraja instituted the fourth and present Execution Case No. 42 of 1942. This application was opposed by the judgment-debtor on the ground that the third Execution Case No. 75 of 1937, filed by Maiya Dalip could not enure to the benefit of Ramraja and that since more than three years had elapsed from the date of the final order in the previous Execution Case No. 122 of 1935, the decree had become time-barred. Before the learned Additional Subordinate Judge the appellant relied upon the decisions in A I R. 1917 Mad. 2[1] and A. I. R. 1938 Pat. 531[2] as supporting his contention that Execution Case No. 75 of 1937 did not enure to the benefit of Ramraja. In both these cases a similar question arose as to the effect, if any, upon limitation of a previous application in execution and in both the cases it was held that an application for execution by one person, whose alleged interest in the decree to be executed was hostile to that of the person there seeking to execute, could not enure to the benefit of the latter. The respondent before the learned Additional Subordinate Judge relied upon two decisions of this Court in A. I. R. 1944 Pat. 307[3] and A. I. R. 1938 Pat. 457.[4] In the first of these cases, which was decided by my learned brother sitting with Sinha J. it was held that the executing Court must take the decree as it stands, that the parties should not be allowed to go behind the decree and allege and prove that some persons other than the parties appearing on the face of the record are the real beneficiaries and that such a question can conveniently be dealt with in a regularly constituted suit. It was said consequently that a beneficiary who alleges himself to be the real decree-holder has no *locus standi* in the executing Court to come up and claim that he is entitled to execute the decree in his own name. It is to be remarked that in that case it was the identity of the real decree-holder which was in issue and not, as in the case before us, the identity of the real transferee from the decree-holder. In the second case, to which I shall revert in more detail hereafter, it was held that an application made by the real assignee of a decree, which was struck off upon the benamidar claiming that it was he who was the real assignee before the date of the decree obtained by the real assignee declaring that he was the real transferee did not enure to his benefit. The learned Additional Subordinate Judge concluded that before the decision in Title Suit No. 31 of 1937 Ramraja was not competent to file an application for execution of the decree as heir of the real beneficiary and that, even if so filed, it would have been incompetent in law and would not have saved limitation and he held that that being so and since the position of Maiya Dalip on the date when she instituted Execution Case No. 75 of 1937 was that of a benamidar that application will enure to the benefit of Ramraja. It is against this decision that this appeal has been brought.

[3] In addition to the point taken before the learned Additional Subordinate Judge, Mr. B. N. Mitter, who appeared for the appellant, urged that Execution Case No. 75 of 1937 was in any event a void proceeding because there was nothing to show that Maiya Dalip, as was incumbent upon her, had made any application under O. 21, R. 16, Civil P. C., which would entitle her to execute the decree as a transferee thereof, and that, in any event, Ramraja's application in Execution Case No. 42 of 1942 could not be granted, firstly, because it did not appear on the face of the record that he had ever applied under O. 21, R. 16, Civil P. C., to be allowed to execute the decree and, secondly,

because the declaration obtained by Ramraja was not sufficient in itself to constitute him a transferee of the decree or, therefore, entitled in any way to execute the same.

[4] Before considering these various contentions it will, I think, be convenient to clear our minds as to the position of a benamidar in general. In this connection I would refer first, to the judgment of a Division Bench of the Madras High Court, consisting of Devadoss and Pakenham-Walsh JJ. in 55 M. L. J. 856.[5] In the course of their judgment in that case, their Lordships made the following observations upon the positions, respectively, of the real owner and the benamidar in relation to a benami transaction :

"When a person acquires an interest in property with his funds in the name of another for his own benefit the latter is called a benamidar. A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name but the property does not vest in him but is vested in the real owner. He is only a name-lender or an *alias* for the real owner. The cardinal distinction between a trustee as known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the *cestui que trust* is only a beneficial owner, whereas, in the case of a benami transaction, the real owner has got the legal title though the property is in the name of the benamidar. It is well settled that the real owner could enforce his remedy in respect of property standing in the name of a benamidar without reference to the latter. If a mortgage stands in the name of a benamidar, the person for whom the mortgage was obtained could sue on the mortgage, and the same rule applies to other transactions except those forbidden by law. The benamidar has some of the liabilities of a trustee but not all his rights. When the benaminar is in possession of the property standing in the name, he is in a sense the trustee for the real owner. It is well settled now that a benamidar can sue in his own name. He can give a discharge to an obligor, who not knowing the real nature of the transaction, *bona fide* pays him the amount due from him."

and, again later—

"It is to the interest of the real owner to protect his rights when he thinks that the action of the benamidar might prejudice him. As the benamidar is only an *alias* for the real owner, the real owner could always step in and say that he is the person who is entitled to the property or contract standing in the name of the benamidar."

I would next quote the following extract from the judgment of Lord Atkinson when delivering the judgment of the Judicial Committee in 35 I. A. 98[6] at p. 102:

In Mayne's Hindu Law (7th edn. p. 595, para. 446) the result of the authorities on the subject of benami transactions is correctly stated thus :

"446— Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested."

I would next refer to the judgment of the Judicial Committee in 46 Cal. 566.[7] In the course of their judgment in that case their Lordships of the Privy Council have stated:

"So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed the benamidar has no beneficial interest in the property or business that stands in his name, he represents, in fact, the real owner, and so far as their relative legal, position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of res judicata. With this view their Lordships concur. It is open to the latter to apply to be joined in the action ; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him. In case of a contest between an alleged benamidar and an alleged real owner, other considerations arise with which their Lordships are not concerned in the present case."

The above observation that it was open to the person beneficially entitled to apply to be joined in the action would appear to indicate that a suit would lie at the instance of the person beneficially entitled, though, of course, it would, in such a case, be open to the defendant, if the alleged benamidar had not already been made a party to the suit, to apply to make the benamidar a party thereto.

[5] It will be convenient to deal first with the point that the third Execution Case No. 75 of 1937 instituted by Maiya Dalip was void in that there is nothing on the face of the record to show that she had made any application under O. 21, R. 16, Civil P. C. to the executing Court at Benares for leave to execute the decree as the transferee thereof. The contention ignores the amendment to O. 21, R. 16 which came into force on 1-3-1936, that is to say, more than ten months prior to the assignment to Maiya Dalip. Under the amendment, where the decree has been transferred for execution by some Court other than the Court which passed the decree, the application under the rule is properly made to the transferee Court.

[6] I turn, therefore, to the point taken in the Court below that Execution Case No. 75 of 1937 cannot enure to the benefit of Ramraja because his own objections thereto and the subsequent title Suit No. 31 of 1937 brought by him against Maiya Dalip show clearly that in filing Execution Case No. 75 of 1937 Maiya Dalip was acting in her own interest and hostile to the interest of Ramraja. No doubt, where two persons claim to execute a decree by virtue of rights which are entirely independent of each other, as, for instance, where each claims to be the heir of the deceased decree-holder, an application for execution by one of them in his own right will not and cannot

operate as an assertion of the independent right of the other and so will not enure to the benefit of that other, but where the sole *locus standi* of the one to claim to execute the decree derives solely from the lending of his name to the other, their respective rights to enforce the decree are not independent of each other. It follows from the declaration obtained by Ramraja in title Suit No. 31 of 1937 that the entry of the name of Maiya Dalip in the transfer instrument was never more than a mere *alias* for Rani Chhatra Kumari. In applying to be brought upon the record of Execution Case No. 122 of 1935 and in filing Execution Case No. 75 of 1937, Maiya Dalip necessarily relied solely upon the entry of her name in the deed of transfer, but that entry being in law a mere alias for Rani Chhatra Kumari and after her death, her heir Ramraja, Maiya Dalip must clearly be held in law to have been asserting the right of Rani Chhatra Kumari and later of her heir Ramraja. A person in the position of a benamidar cannot in law act in relation to the benami property in a manner hostile to the real owner and if he attempts to do so the law will restrain him from so doing and the real owner is entitled to the benefit of a wrong act done by the benamidar in relation to the benami property. The underlying principle is that stated by Lord Ellenborough in (1815) 3 M. & S. 562.[8] In that case a draft for money was entrusted to a broker to buy Exchequer bills for his principal and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and bullion, who sold the whole and received the proceeds. It was held that the principal was entitled to withhold the proceeds from the assignee of the broker, who became bankrupt on the day on which he so received and misapplied the money draft. The relevant portion of Lord Ellenborough's judgment reads as follows:

"Upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law."

Any proceeds realised by Maiya Dalip as a result of Execution Case No. 75 of 1937 would clearly have belonged to Ramraja; that being so it is idle to pretend that those proceedings do not enure to his benefit.

[7] There remains the last point taken by the appellants, namely, that the declaration in title Suit No. 31 of 1937 did not itself suffice to constitute Ramraja a transferee of the decree within the meaning of O. 21, R. 16 and that therefore the present Execution Case No. 42 of 1942 was incompetent. In this respect, great reliance was placed upon the decision of this Court in 17 Pat. 223.[4] In that case A obtained a decree for possession and mesne profits in 1920 and thereafter he assigned 7 annas interest in the same in favour of N, who took the assignment in the name of M. The amount of mesne profits was ascertained and a final decree was passed in 1923. In 1925, A and N applied for execution of the decree, but the execution was struck off as M claimed that he was the real assignee and the parties were referred to get the matter determined by a suit. N got the declaration that he was the real transferee, and thereafter in 1935, an application was filed for execution and the judgment-debtor asserted that the application for execution of the year 1925, was not in accordance with law and therefore the present application for execution of 1935 was barred by limitation. The headnote to that case goes on to state :

"*Held*, that the transferee under a deed of assignment referred to in R. 16 of O. 21, was the person named in the deed and not the real transferees" and

"*Held*, also, that in view of the express provision of the law, O. 21, R. 16, the mere fact that a declaration was made that N was the real transferee did not entitle him to levy execution."

In my opinion, the latter part of the headnote is inaccurate and misleading. What was held in that case was that the earlier application for execution in 1925 was invalid in that it was not made by a transferee of the decree, because the transferee under a deed of assignment is the person named therein as transferee and that when the executing Court, upon the objection by the benamidar, referred N and M to the civil Court in order that their respective rights and obligations might be determined in a properly constituted suit, it had not decided by inference that if N succeeded in obtaining a declaration of his rights then he would have been entitled to execute the decree at the time of the earlier application in 1925. That this is the true scope of the decision in that case is clear from the following extract from the judgment of Wort J.:

"It will be seen that the only question for decision whether the last application of 5-3-1935, is barred by limitation depends upon the validity, of the application of 14-7-1925, being the first application for exe-

cution. If for any reason it is held, as the Judge in the Court below has held, that the first application of 14-7-1925 was not in accordance with law within the meaning of Art. 182, Limitation Act, then it is clear that all the subsequent applications must necessarily go, on one ground alone that they would be barred by limitation.

Now, the point can be stated in this way ..... Now it seems to me quite clear on the plain reading of the rule itself that the view that should be taken appears on the face of the rule itself. If the interest of any decree-holder in a decree was 'transferred by an assignment in writing,' etc., the transferee under a deed of assignment is the person who is named as a transferee. There can be no doubt about that—it is trite. But Dr. Mitter says that we should have regard to the universal practice in India of carrying out transactions in the benami names and he refers us to the decision of the Privy Council in 46 Cal. 566.[7] There Ameer Ali J. in delivering the judgment of the Board, makes reference to this practice in these words :

The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. There is nothing inherently wrong in it and it accords, within its legitimate scope, with the ideas and habits of the people.

Then his Lordship refers to the opinion of their Lordships of the Judicial Committee as stated by Sir George Farwell in 37 All. 557[9] where Sir George Farwell states :

'It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money.'

Then Mr. Ameer Ali proceeds to say :

'As already observed, the benamidar has no beneficial interest in the property or business that stands in his name, he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him.'

I must say that I fail to understand the argument of Dr. Mitter on this point. It is of course obvious to any one even with the least experience in this country that this practice of carrying out what is described as benami transaction exists, but it cannot alter the law. If every transaction was carried out in the benami name of another and that custom was universal and there was no departure from it in one single instance, then such custom might be proved and it might perhaps be said that 'you have established a custom, the effect of which would be to establish the proposition that where the word 'transferee' is used in a document in India it means the real transferee and not the benamidar.' It is only in that extreme case that the argument can avail the appellants in my judgment. The transferee under the deed of assignment we are dealing with was Mohammad Akhtar and no other; what rights a real transferee, the beneficiary under the deed, may have for the purposes of this case are neither here nor there. Indeed so far as O. 21, R. 16, is concerned, it seems to me that the alteration of law which appeared first of all in the Code of 1877, that is to say, the requirement that an assignment of the decree should be in writing, was a provision which the Legislature enacted for the very purpose of preventing difficulties of the kind, we have to deal with here. It was unsuitable, as their Lordships of the Privy Council point out in one of their decisions in this matter, that questions of this kind should be determined in execution ; and that leads me to the other branch of the argument in connection with this part of the case addressed to us by Dr. Mitter.

Whilst these various applications were being made in execution as we have seen the action for a declaration that Nazir Ahmad was the beneficiary under the deed was pending in the Court and was ultimately decided. It was contended that this Court gave a declaration in favour of Nazir Ahmad and that, as his right dated back to the application of 14-7-1925, therefore it was shown that he was the person who was entitled to take out the application for execution. What argument begs the question. All that the High Court decided was that Nazir Ahmad was the real owner of the 7-annas interest of the decree if I may put it in that language. The question whether he was entitled to sue out execution was not decided by any of the Courts in that case and necessarily could not be decided. But it is further contended in this regard that the Subordinate Judge in referring the parties to a properly constituted suit by inference decided that if the plaintiff succeeded in getting this declared then he was entitled to apply for execution of the decree. That in my judgment is an argument which cannot be supported. The learned Judge did not commit himself in that way and indeed we know that that application was eventually struck off. The question was never decided and further more there can be no inference drawn from what actually took place because it may very well be that the learned Judge was of the opinion that the beneficiary Nazir Ahmad might have joined with the benamidar in making the application and indeed there is no knowing what the ultimate decision of the Subordinate Judge in the execution proceedings would have been had the question come to be determined by him. Now the other branch of the case relates to O. 21, R. 15, Civil P. C."

[8] It is perfectly clear, in my opinion, that their Lordships in that case never purported to consider the question whether, following the declaration obtained by *N* he was entitled to apply for execution in the very execution case before him. Their decision was restricted to the validity or otherwise of the earlier application for execution in 1925 which preceded the declaration obtained by *N* in the civil Courts. Indeed, if their Lordships had been of the opinion that the very execution case itself before them was invalid on that ground, it is difficult on the face of the judgments to understand why they should have troubled to consider the earlier execution at all. In my opinion, therefore, the case in 17 Pat. 223[4] has no application to the question now under consideration in this case and is not therefore decisive of the point before us. I feel bound to state, however, that if I had thought that we were bound by that decision, I should have felt compelled to refer the appeal to the Hon'ble Chief Justice in order, if he were so pleased, that it might be decided by a larger Bench, because, with the greatest respect, I find it impossible to reconcile the ratio decidendi of their Lordships in that case with the general proposition of law stated by their Lordships of the Privy Council as above cited as to the legal relationship between a benamidar and the real owner. If the benamidar named in an instru-

ment of transfer is a mere alias for the real owner, then the transferee is and always was the real owner. The word 'transferee' in O. 21, R. 16 must be understood to mean the legal transferee and, in the case of a benami transfer, that is the real owner. No doubt, when the real owner comes forward to assert his status as transferee, the position of the transferor, of the judgment-debtor and of the alleged benamidar must be protected. So far as the transferor and the judgment-debtor are concerned, this protection is provided by the proviso to O. 21, R. 16. So far as the position of the alleged benamidar is concerned if he denies the benami nature of the transaction, I should have thought myself that his and the alleged real owner's respective rights could and should properly be decided by the executing Court since they are each of them claiming in effect to be parties to the decree, but the decisions of this Court are to the effect that their rights should be worked out in a separate suit instituted for the purpose in the appropriate Civil Court. If, in such a case, the executing Court refers the real owner to the civil Court, it has a duty to protect his position in the execution and not to make itself a party to the situation where, by reason of the ordinary duration of civil proceedings, his right to execute the decree will become time-barred. The proper order to be made by the executing Court upon an application by a person alleging himself to be the real owner of a decree under a benami transfer thereof, if the alleged benamidar denies the benami nature of the transfer, is to stay further proceedings upon the application pending the decision of the civil Court subject to the institution of a suit by the alleged real owner for a declaration of his status as such within a reasonable time.

[9] It follows from the views which I have already expressed and from the general propositions of law above cited as to the respective positions of the benamidar and the real owner in relation to the property the subject of the benami transaction, that, in my opinion, upon, the mere declaration by a competent Court of his status as the real owner, the latter is a transferee within the meaning of O. 21, R. 16 and that it is not necessary for him to obtain an actual transfer of the decree to himself from the benamidar or from the Court. The declaration of his status as such has the effect of declaring that the benamidar's name in the instrument of transfer is a mere alias for that of the real owner and, therefore, that the real owner is in fact and in law the actual transferee thereunder.

[10] I would, therefore, dismiss the appeal with costs.

[11] **Beevor J.**—I agree, but would like to add some remarks of my own on one point raised in this appeal.

[12] As regards the decision in 17 Pat. 223,[4] I agree with my learned brother in thinking that that case may need reconsideration by a larger Bench when occasion arises, but it is unnecessary to ask for any such reference in connection with the present appeal. It is, I think, important to notice that the decree under execution in that case was for execution of a final decree for mesne profits passed on 6th March 1923, in favour of Mohammad Anas and Mohammad Akhtar. The latter was the furzidar of one Mohammad Nazir Ahmad who had taken a transfer of a seven anna interest in the preliminary decree in the name of the furzidar from Mohammad Anas who was the sole decree-holder of the preliminary decree. On 14th July 1925 an application for execution was made by Mohamad Anas and Nazir Ahmad. It was held that that application was not a valid application for the purpose of saving subsequent applications from the bar of limitation. It will be noticed that there is no allegation that there was any assignment between the date of the final decree and the date of the application for execution filed on 14th July 1925. It seems to me, therefore, that what was really decided in that case is that where there has been no assignment after the date of the decree no person can file an application for execution alleging that the person in whose name the decree stands is a benamidar, and thus the decision has really no application to the cases of transfer of decrees which are dealt with under O. 21, R. 16, Civil P. C.

S. C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 328** *[C. N. 117.]*

SHEARER AND REUBEN JJ.

*Mt. Bibi Safia and another—Appellants* v. *Yusuf Md. Muzaffar and others — Respondents.*

A. F. O. D. No. 193 of 1944, Decided on 14-3-1947, from decision of Sub-Judge, Patna, D/- 31-7-1944.

**(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 60—Bengal Land Registration Act (7 [VII] of 1876), S. 78—Scope of—Mukarari rent, suit for arrears of, by donee of property — Suit decreed in respect of period subsequent to mutation of donee's name in Register D but dismissed in respect of period prior to it—Second suit by donee and donor in respect of claim disallowed in previous suit—Donor held entitled to decree.**

**At one time it was, no doubt, incumbent on a plaintiff in a rent suit to show that the relationship of landlord and tenant existed between the defendant and himself or that he had a good title to the estate of which he was the registered owner : 9 Cal. 517, *Ref.*** **[Para 1]**

**When, however, S. 60, Bihar Tenancy Act was enacted the Legislature took a further step forward and debarred a defendant in a rent suit from pleading that the plaintiff if he was a registered proprietor, was not in fact the true owner and rent was not due to him but to some one else: 8 Cal. W. N. 695, *Ref.*** [*Ibid*]

**It is now well settled that a person who is a registered proprietor is entitled to recover rent even if he has conveyed his title to a third person: 4 A. I. R. 1917 Pat. 532, *Ref.*** [*Ibid*]

**There is nothing to prevent a person who has taken a conveyance of a proprietary interest in an estate and who has, for some reason or other, not taken steps to have his name entered in Register *D* from coming to an arrangement with his vendor under which the latter will institute suits to recover arrears of rent due by tenants and will pay over to him any sums which he may recover. The object of the Legislature in enacting S. 78, Bengal Land Registration Act was to coerce owners of estates into registering themselves as owners and the object of the Legislature in enacting S. 60, Bihar Tenancy Act was to afford protection to tenants who paid rent to persons so registered although they might have ceased to be the true owners. It cannot have been intended that tenants should find in these provisions a loophole enabling them to escape all liability for the payment of rent.** [*Ibid*]

***A* instituted a suit for recovery of arrears of mokarari rent for certain period basing her claim on an oral gift by her mother. The Court decreed the suit in respect of her claim subsequent to the date of mutation of her name in Register *D*, and dismissed the suit in respect of her claim prior to it. Subseqnently *A* and her mother *B* filed another suit for recovery of arrears of rent for the period for which the claim was disallowed in the previous suit:**

***Held* that *B* was entitled to a decree.** [*Ibid*]

**(b) Bihar Tenancy Act (8 [VIII] of 1885), S. 184, Sch. III—Mokarari lease to collect rent from occupancy raiyats and to cultivate large area of land—Suit for rent—Sch. III applies and not Limitation Act—Limitation Act (1908), Art. 110.**

**Where a mokarari lease of a village to collect rent from occupancy raiyats, and also to cultivate a large area of land is granted by a registered kabuliyat, the mokararidars become tenure-holders and the lease is governed not by Transfer of Property Act but by Bihar Tenancy Act and to a suit for arrears of rents the limitation applicable is one provided by Sch. III, Bihar Tenancy Act and not that provided by Limitation Act: 24 A. I. R. 1937 Cal. 587 and *Other case-law considered.*** [Para 2]

**('42-Com.), Limitation Act, Art. 110, N. 5, pts. 7-9.**

***Cases referred:*—**

**1. ('83) 9 Cal. 517, Ramkristo Dass v. Shaikh Harain.**
**2. ('04) 8 C. W. N. 695, Sadhu Charan Pal v. Radhika Mohan Roy.**
**3. ('17) 3 P. L. W. 351 : 4 A. I. R. 1917 Pat. 532 : 41 I. C. 97, Hardayal Mahton v. Wazir Mahton.**
**4. ('44) 23 Pat. 185 : 31 A. I. R. 1944 Pat. 87 : 212 I. C. 473 (F. B.), Maheshwari Prasad v. Manrajokuer.**
**5. ('92) 19 Cal. 1 (FB), Mackenzie v. Mahomed Ali Khan.**
**6. ('90) 17 Cal. 469, Iswari Pershad Narain Sahi v. Chowdry.**
**7. ('37) I. L. R. (1937) 2 Cal. 631 : 24 A. I. R. 1937 Cal. 587 : 173 I. C. 540, Alauddin Ahmed v. Tomijuddin Ahammed.**
**8. ('17) 44 Cal. 759 : 3 A. I. R. 1916 P. C. 182 : 44 I A 65 : 39 I. C. 156 (P. C.), Tricomdas Cooverji v. Gopinath Jiu Thakur.**

***S. N. Bose, Syed Akbar Hussain and G. Muhammad*—for Appellants.**

***B. C. De, Lal Narain Sinha, Syed Hasan and K. D. De*—for Respondents.**

**Shearer J.**— This appeal arises out of a decree of the learned Subordinate Judge of Patna, dismissing a suit to recover arrears of mukarrari rent. There were two plaintiffs in the suit, Bibi Sayeedunnisa and her daughter Bibi Safia, and the circumstances out of which the appeal arises are somewhat exceptional. It is admitted that Bibi Sayeedunnissa was a cosharer landlord of the estate in which the mukarrari tenure is situated, and throughout the period from 1343 Fasli up to 15th Pus, 1346 Fasli, her name was recorded in register D. In 1939 her daughter, Bibi Safia, instituted a suit to recover arrears of rent due in respect of the mukarrari tenure for the period from 1343 to 1346 Fasli. In this suit, in which Bibi Sayeedunnisa did not join as a plaintiff, Bibi Safia asserted that, at the time of her marriage, which took place at the end of 1342 Fasli or at the beginning of 1343 Fasli, her mother had made an oral gift to her of her proprietary rights. Bibi Safia had delayed in taking steps to have her name entered in register D. Her name was not entered there until 21st December 1938, and the learned Subordinate Judge who tried the suit gave her a decree for arrears of rent which accrued due after that date. So far as the claim for the antecedent period, that is, the period prior to 15th of Pus, 1346, was concerned, the learned Subordinate Judge dismissed the suit on the ground that he was not satisfied that there had been any oral gift or, at all events, that that oral gift had been made at the end of 1342 Falsi. Bibi Sayeedunnissa and Bibi Safia then instituted the suit out of which this appeal arises, in which they sought to recover rent for the period from 1343 Fasli up to 15th of Pus, 1346 Fasli, and again for the period from 1347 Fasli to 1349 Fasli. Subsequently, the two ladies appear to have been advised that the suit might fail for misjoinder of plaintiffs and misjoinder of causes of action and so Bibi Safia later instituted another suit to recover arrears of rent for the period from 1347 to 1349 Fasli. This suit was decreed and the claim made for that period in the suit out of which this appeal arises was, therefore, disallowed. Thus, we are not concerned solely with the claim made for the period from 1343 Fasli up to the 15th Pus 1346 Fasli. It is quite clear that Bibi Safia, plaintiff 1, was not entitled to maintain another suit in respect of the period from 1343 Fasli up to the 15th Pus, 1346 Fasli, her claim to rent for that period having been disallowed in the prior suit. It is, perhaps, unfortunate that plaintiff 2, Bibi Sayeedunnissa, did not institute a separate suit in respect of this period. If she had done so, and had not joined her daughter in that suit as a co-plaintiff, she would certainly have been given a

decree. It was still more unfortunate that in para. 2 of the plaint the following averment was made:

"By means of a verbal gift plaintiff 2 made over the said property to plaintiff 1 from 1343 Fasli. Plaintiff 1 instituted Rent Suit No. 3 of 1939 in the second Court of Sub-Judge at Patna. But since the name of plaintiff 1 was not recorded before 22-12-1938, the Court did not pass a decree for the period from 1343 Fasli to 15th Pus, 1346 Fasli, on this ground that the title of plaintiff 2 was intact during the aforesaid years. Hence it is necessary for both the plaintiffs to institute this suit".

In the relief portion of the plaint the Court was asked to pass a decree "for the period from 1343 Fasli up to 15th Pus 1346 Fasli in favour of plaintiff 1 or plaintiff 2 whoever may be deemed entitled to by the Court." The learned Subordinate Judge regarded the averment in the plaint, which I have just set out, as amounting to an admission that plaintiff: 2 had no cause of action, and on this ground disallowed the claim. It seems to me, however, that in effect what the plaintiff 2 there said was:

"I believe that in 1343 Fasli I did what was necessary to divest myself of my proprietary rights and to vest these proprietary rights in my daughter, but a Court of competent jurisdiction has come to the conclusion that this was not so, and, therefore, I am entitled to maintain this suit".

It is, I think, not very material that in the relief portion of the plaint she and her daughter invited the Court to reopen a matter which, it is plain, had been left in a good deal of doubt by the judgment in the earlier suit and decide when exactly the proprietary right had passed from the one of them to the other. At one time it was, no doubt, incumbent on a plaintiff in a rent suit to show not merely that he was the recorded proprietor but also that the relationship of landlord and tenant existed between the defendant and himself or that he had a good title to the estate of which he was the registered owner: 9 Cal. 517.[1] When, however, S. 60 of the Bengal Tenancy Act was enacted, the legislature took a further step forward and debarred a defendant in a rent suit from pleading that the plaintiff, if he was a registered proprietor, was not in fact the true owner and rent was not due to him but to someone else: 8 C. W. N. 695.[2] It is now well settled that a person who is a registered proprietor is entitled to recover rent even if he has conveyed his title to a third person. In fact, it has been doubted whether a Court is entitled to dismiss his suit even when there has been litigation between himself and some third person and a Court of competent jurisdiction has decided that not he but that third person is the true owner: 3 Pat. L. W. 351.[3] There is nothing to prevent a person who has taken a conveyance of a proprietary interest in an estate, and who has, for some reason or other, not taken steps to have his name entered in register D, from coming to an arrangement with his vendor, under which the latter will institute suits to recover arrears of rent due by tenants and will pay over to him any sums which he may recover. The object of the legislature in enacting S. 78, Land Registration Act, was to coerce owners of estates into registering themselves as owners, and the object of the legislature in enacting S. 60, Bengal Tenancy Act, was to afford protection to tenants who paid rent to persons so registered, although they might have ceased to be the true owners. It cannot have been intended that tenants should find in these provisions a loophole enabling them to escape all liability for the payment of rent. In my opinion, the averment in the plaint ought not to be, and cannot properly be, construed as an admission that plaintiff 2 had no cause of action, and in any case, even if it could, I doubt whether the defendants are any more entitled to take advantage of it than they were entitled to adduce evidence to show that plaintiff 2 had parted with her proprietary interest at the end of 1342 Fasli. The suit was instituted on 28-9-1942, which was exactly three years from the last day of the Fasli year 1346. The plaintiff 2 was, therefore, entitled to a decree for the rent which fell due at the Kartik *kist*, 1346 Fasli, together with interest and proportionate costs. If the period of limitation which is applicable to the suit is that prescribed in the schedule to the Bihar Tenancy Act, the claim for the period from 1343 to 1345 Fasli is barred by limitation. It is, however, contended that the period of limitation which applied is that prescribed by Art. 116, Limitation Act. The *kabuliat* which was executed by the predecessors in interest of the defendants was, it should be said, a registered *kabuliat*. On behalf of the appellants it is urged that the lease was not an agricultural lease but a lease to which the provisions contained in the T. P. Act are applicable. For this proposition, reliance was placed on the recent Full Bench decision of this Court: 23 Pat. 185.[4] What the learned Judges there had to consider was not, however, a *mukarrari* lease but an ordinary *thika* or farming lease. The *ratio decidendi* was that a *thikadar*, or a farmer, was not a tenure-holder in that such a lease does not contemplate holding of any land by the lessee. Developing this point Fazl Ali, C. J. said:

"A person is not a tenure-holder under the Bengal Tenancy Act unless he is a tenant as defined in the Act and he is not a tenant unless he holds land for agricultural purposes".

Our attention was invited to an observation by Manohar Lall J., who after referring to S. 179 (a), Bihar Tenancy Act, said:

"Now a permanent mukarridar may also be called a tenure-holder in the loose sense of the word, but the legislature is not out to protect such a person because

he becomes practically in the position of a proprietor and so a permanent *mukarrari* lease is kept outside the provisions of the Bihar Tenancy Act".

This observation was, however, in the nature of an *obiter dictum*. Later in his judgment the same learned Judge, who concurred in the opinion expressed by Fazli Ali, C. J. and Chatterji J., said :

"I would repeat that it is the purpose or dominant purpose of the settlement that would decide the question whether the Transfer of Property Act or the Bihar Tenancy Act applies".

Now, from what is contained in the *kabuliat* which was executed by the ancestors of the defendants, it would seem that they were very substantial cultivators, owning a great deal of land in this village. Their occupancy holding, or occupancy holdings, had been sold in execution of rent decrees, and this had led to litigation which had been carried to their Lordships of the Judicial Committee. This litigation was compromised, one of the terms of the compromise being that the ancestors of the defendants should take this *mukarrari* lease of the village. The *kabuliat* contains elaborate provisions imposing on the executants an obligation to maintain intact the irrigation system. It also contains the following clause which is, I think, of some significance :

"The expenses relating to earth-work, seh-bandi, construction of house, cultivation of village, and construction of culvert and brick-built and mud build wells and other village expenses shall be the concern of me, the declarant."

[2] It is, in my opinion, quite clear from all this that, although the original *mukarraridars* were to collect rent from such other occupancy *raiyats* besides themselves as there had been in the village, they were also to cultivate much of the land in the village themselves. The learned Subordinate Judge was, therefore, in my opinion, correct in holding that the defendants were tenure-holders and that the provisions of the Bihar Tenancy Act and not of the T. P. Act were applicable. As far back as 1891 a Full Bench of the Calcutta High Court decided that suits for rent founded on registered contracts in respect of land subject to the provisions of the Bengal Tenancy Act are governed by the limitation provided in that Act: 19 Cal. 1[5] The judgment is a very brief one, and it may, I think, be presumed that the learned Judges who were parties to it endorsed the reasoning of Trevelyan and Beverley JJ. in the earlier decision in 17 Cal. 469,[6] It was there pointed out that, if Art. 116, Limitation Act was to apply when there was a registered lease, not only would the period of limitation be different but also the starting point at which limitation began to run would be different. This, it was said, was "a result which we think the Legislature never intended." Biswas J. of the Calcutta High Court in I. L. R. 1937-2 Cal. 631[7] at p. 642 has recently expressed the opinion that the decision in 19 Cal. 1[5] now requires reconsideration. On this point, however, Henderson J. who was a party to the decision in which he made this observation, refrained from expressing any opinion. Biswas J. in expressing the opinion which he did, was mainly influenced by the decision of their Lordships of the Judicial Committee in 44 Cal. 759.[8] That was a case in which the lease was not governed by the Bengal Tenancy Act but by the Transfer of Property Act, and the question that arose was whether Art. 110 or Art. 116, Limitation Act applied. Their Lordships of the Judicial Committee took the view that, while a suit to recover arrears of rent due under a registered lease would come, more naturally perhaps, under Art. 110, it was scarcely possible to say that Art. 116 could not apply. They went on to point out that, except in one case decided in 1903 by a Judge of the Allahabad High Court sitting singly, the view uniformly taken by the Courts in India had been that Art. 116 was the article which prescribed the period of limitation in such cases. Mainly, therefore, on the principle *stare decisis* they endorsed the view which had for so long been taken by the Courts in this country. 44 Cal. 759[8] was decided in 1916, and, as S. 29, Limitation Act then stood, no doubt could have been created by it as to the correctness of the Full Bench decision of the Calcutta High Court. The section then stated :

"29. (1) Nothing in this Act shall —

* * * *

(b) affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

In 1922, however, S. 29, Limitation Act, was amended. Sub-section (2) of S. 29 now provides :

"29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by Sch. 1, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that schedule."

In view of this, it may, perhaps, be contended that in a suit for arrears of rent Art. 110 applies, the period of limitation shown in it being, however, the period of limitation prescribed by the Bihar Tenancy Act where the Bihar Tenancy Act applies to the tenure. It does not, however, by any means follow, in my opinion, that, where there is a registered lease, the article applicable will be Art. 116 and not Art. 110 as modified in the manner just indicated. Indeed, one of the grounds on which their Lordships of the Judicial Committee based their decision in 44 Cal. 759,[8] namely, the undesirability of upsetting a long current of decisions, would justify the view that Art. 116 should be held to be inapplicable. For these reasons, the decision of the learned Sub-

ordinate Judge on the point of limitation was, in my opinion, correct. As I have already said, plaintiff 2 is entitled to a decree for rent for the Kartik kist of 1346 Fasli and to interest on the amount so due. I would allow the appeal and decree the suit accordingly. Plaintiff 2 is also entitled to costs in proportion to the extent of her success in this Court and in the Court below.

[3] **Reuben J.** — I agree and would add a few words on the point of limitation. Biswas J. in I L.R. (1927) 2 Cal. 631[7] referring to the case in 44 Cal. 759[8] says :

"Applying the line of reasoning accepted by the Judicial Committee in the interpretation of the relevant Articles, it may be well doubted why, if Art. 110 does not affect Art. 116, Limitation Act, Art. 116 will be at all affected by the special provision of Art. 2 of Sch. 3, Ben. Ten. Act. By virtue of Ss. 184 and 185, Ben. Ten. Act, Art. 2 of Sch. 3 of this Act may be said to take the place of Art. 110, Limitation Act, and Art. 116, Limitation Act, may be deemed to be incorporated in the Bengal Tenancy Act. If Art. 110 is then superseded by Art. 116, Limitation Act, there seems to be no valid reason why Art. 116, should not similarly supersede Art. 2 of Sch. 3, Ben. Ten. Act."

The relevant provisions of the Bihar Tenancy Act are similar to those of the Bengal Tenancy Act. I would respectfully suggest that the answer to the query of Biswas J. is to be found in sub-s. (2) of S. 185, Bihar Tenancy Act :

"Subject to the provisions of this Chapter, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals and applications mentioned in the last foregoing section."

There is a corresponding provision in S. 185, Ben. Ten. Act. The application of Art. 116, Limitation Act, therefore, is subject to the provisions of the Bengal Tenancy Act on the subject of limitation. Under S. 184 of the Act, suits specified in Sch. 3 of the Act "shall be instituted within the time prescribed in that schedule for them." Hence the period of limitation prescribed in Sch. 3 for a suit for the recovery of arrears of rent will apply in this case and will exclude the period of limitation under Art. 116, Limitation Act.

R.G.D. *Appeal allowed.*

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**A. I. R (35) 1948 Patna 332** *[C. N. 118.]*

MANOHAR LALL AND MUKHARJI JJ.

*Amrit Ram and others — Appellants* v. *Tikait Dwarka Narayan Sahi—Respondent.*

A.F.O.D. No. 54 of 1944, Decided on 26-3-1947, from decision of Sub-Judge, Hazaribagh, D/- 21-2-1944.

**Grant — Construction — Sanad "Dowami Jagir" does not necessarily refer to hereditary interest — Other relevant circumstances are to be considered to find out grantor's intention.**

**The words "Dowami Jagir" in a Sanad do not unequivocally refer to a hereditary interest or interest lasting beyond the life of the grantee. The meaning of the crucial words not being quite clear it cannot be said that the intention of the grantor is quite apparent on the face of the document. In such a case one has, therefore, to look to the other relevant circumstances such as the circumstances under which the document was executed, the other terms of the document and the subsequent conduct of the parties, to find out the real intention of the grantor. (Considering these it was held that the Jagir was a resumable service tenure and not permanent and heritable one): 15 A. I. R. 1928 Pat. 451, 13 Beng. L. R. 124 (P. C.) and 12 Cal. 117 (P. C.), *Ref.* [Para 6]**

*Cases referred:*—

1. ('28) 7 Pat. 752 : 15 A. I. R. 1928 Pat. 451 : 111 I. C. 675, Krishna Prasad Singh v. Budhan Manjhi.
2. ('74) 13 Beng. L. R. 124 : I. A. Sup. Vol. 181 : 3 Sar. 238 (P. C.), Raja Lilanand Singh Bahadur v. Thakur Munoranjan Singh.
3. ('86) 12 Cal. 117 : 12 I. A. 205 : 4 Sar. 646 (P. C.), Tulsi Prasad Singh v. Ram Narain Singh.
4. (1842) 1 Dr. & War. 353, Attorney-General v. Drummond.
5. (1900) 26 I. A. 216 : 27 Cal. 156, Beni Pershad Koeri v. Dudhanath Roy.
6. ('34) 13 Pat. 589 : 21 A. I. R. 1934 P. C. 182 : 61 I. A. 333 : 150 I. C. 807 (P. C.), Kamakhya Narain Singh v. Abhiman Singh.
7. ('31) 12 P. L. T. 319 : 17 A. I. R. 1930 P. C. 45 : 123 I. C. 145 (P. C.), Surendra Nath v. Kamakshya Narain Singh.

*Mahabir Prasad, Sarjoo Prasad, T. K. Prasad and R. P. Katriar*—for Appellants.

*B. C. De, G. C. Das, Prem Lall and J. G. Sinha*—for Respondent.

**Mukharji J.**—In this first appeal the defendants are the appellants. Plaintiff Tikait Dwarka Narayan Sahi, proprietor of Gadi Tilaiya, pargana Gumoh, thana Kodarma, district Hazaribagh, sued the defendants for declaration of title and recovery of possession in respect of 13 bighas of land covered by a sanad (Ex. A) dated 17th November 1911. The Sanad in question was granted by the then proprietor; Fateh Narain Singh, an elder brother of the plaintiff. Defendants 1 to 17 are the heirs of Jhari Ram, the grantee. Defendant 18, who was subsequently added as a party, is the widow of Jhari Ram. She was impleaded as Jhari Ram had transferred plot No. 3350, one of the plots in dispute, to her by a deed of gift, Ex. L, dated 18th September 1931. A pleader commissioner was appointed at the instance of the plaintiff, and his report which is to be found at page 49 of the Paper Book, Parts I and II, shows that when he visited the locality he found a house under construction on this particular plot. Defendant 19 is an idol of whom defendants 1 to 18 are the sebaits. This defendant was added as a party in view of the fact that by Ex. K, dated 18th September 1931, the said Jhari Ram dedicated a portion of the disputed land to this idol. The claim of the plaintiff was contested by the defendants. Defendants 1 to 5 filed one written statement. Another was filed by defendant 18. Defendants 6 to 17, who were minors, filed another written statement through their guardian ad-litem. They simply adopted the written statement filed by defendants 1 to 5. The learned

Additional Subordinate Judge who tried the case framed as many as 14 issues, some of which were not pressed. Before I refer to the issues, I may here state what the case of the plaintiff-respondent was. Stated within a brief compass, his case was as follows: Deceased Jhari Ram was a karpardaz of Tikait Fateh Narain Sahi. The latter was a very simple man, and Jhari Ram being shrewd had a great hold on him. Jhari Ram used to look after the affairs of Tikait Fateh Narain in Court, and he also managed the other affairs of the Tikait in his capacity as his karpardaz (servant). Tikait Fateh Narain promised to grant a service tenure in respect of the land in schedule kha of the plaint to Jhari Ram for his future service as a karpardaz on condition that if Jhari Ram should cease to render service to the Tikait or his successor-in-interest, the latter will have a right to resume the jagir. On 17th November 1911 a sanad was granted, but not in the terms already settled between Tikait Fateh Narain and Jhari Ram. Jhari Ram, by fraudulent means, got it mentioned in the sanad that it is a dowami jagir and is granted for service already rendered. There was also no mention that if Jhari Ram failed to render services the jagir will be resumed. Within a month or so Tikait Fateh Narain Sahi came to know of the fraud perpetrated by Jhari Ram, and he called him to his presence and rebuked him for what he had done. Jhari Ram expressed regret and promised that the terms already agreed upon will hold good. In the finally published record-of-rights the land in question was recorded as a service tenure resumable on the death of the grantee. Jhari Ram died about the year 1935. The plaintiff who had succeeded to the Gadi on the death of his brother Tikait Fateh Narain Sahi called upon the heirs of Jhari Ram to render service like their deceased father. As they declined to render service, the plaintilf wanted them to give up possession of the suit land, but they refused to do so. The plaintiff was then compelled to bring the suit out of which the present appeal has arisen.

[2] In their written statement the defendants denied that Jhari Ram was ever a karpardaz of Tikait Fateh Narain Sahi. Their case was that Jhari Ram was a money-lender and a businessman. It was further their case that one Akbar Ali brought a suit against late Tikait Fateh Narain Sahi and obtained a decree. According to the defendants, when in the execution proceedings the property of Tikait Fateh Narain was going to be sold Jhari Ram advanced money and saved the property with the result that the Tikait was greatly pleased and granted Jhari Ram a permanent jagir, as evidenced by EX. A. On behalf of the defendants it was also said that Jhari Ram made *pairvi* on behalf on the Tikait in Court in connection with the suit brought by the said Akbar Ali. The allegations of the plaintiff that Jhari Ram continued to render service to Tikait Fateh Narain were denied. It was also denied that after Jhari Ram's death the plaintiff called upon his heirs to render service. The allegation that Jhari Ram committed fraud in the matter of the execution of EX. A was wholly denied.

[3] Issue 2 framed by the learned Additional Subordinate Judge was whether the jagir sanad from Tikait Fateh Narain Sahi was obtained by fraud and misrepresentation by Jhari Ram. The next issue was whether the jagir is a service tenure resumable on cessation of service. Issue 5 was—"Did Jhari Ram disclaim his right under the Sanad or give up any part of the lands granted and admit the resumability of the jagir?" Another issue 7 was whether the suit was barred by limitation and adverse possession. The question as to whether the house on the suit land could be ordered to be demolished was considered under issue 10. Issue 12 was as follows: "Is the plaintiff entitled to khas possession of the suit land? If so can he get it without payment of the value of the house?"

[4] Upon a consideration of the evidence and circumstances the learned lower Court came to the conclusion that there was some sort of agreement or arrangement between the parties by which the sanad, EX. A, was partially superseded. From the survey records the learned lower Court held that the defendants gave up possession of a portion of the suit lands. He further held that during the continuance of the survey proceedings, Jhari Ram admitted that the jagir was a resumable service tenure. So far as the allegations of fraud and misrepresentation were concerned, the clear finding of the learned lower Court is that this part of the plaintiff's case is unacceptable. The learned lower Court granted a decree to the plaintiff in the following terms:

"The suit be decreed on contest as against defendants 1 to 5 and 18 and *ex parte* as against the others. Plaintiff's title to the suit lands is hereby declared and it is hereby declared that he do recover possession of the same on evicting the defendants therefrom. The defendants are ordered to remove the materials of the house standing on plot No. 3350 within one month of this date failing which the house will be demolished by the Court's agency and vacant possession of the site delivered to the plaintiff. Plaintiff will also get mesne profits for three years preceding the institution of the suit in Munsif's Court and up to the date of delivery of possession. In the circumstances of the case plaintiff will not get any costs."

I may mention here that the suit was originally filed in the Court of the Munsif.

[5] On behalf of the defendants-appellants it has been contended that the terms of the sanad,

EX. A, being quite clear, the learned lower Court should not have taken extraneous circumstances into consideration, as he has done in this case. According to the learned Advocate for the appellants the mention of the word 'Jagir Dowami' in the sanad makes it perfectly clear that it is a permanent and heritable Jagir that was granted under EX. A. The decision of the present appeal turns on the construction of the document in question. Before I consider the contents of the document, I may mention that no argument was advanced before us on behalf of the respondent that the finding of the learned lower Court on issue NO. 2 regarding the alleged fraud and misrepresentation is unsustainable. A perusal of the judgment shows that the learned lower Court took pains to consider all the relevant evidence on this point, and arrived at the conclusion that this part of the plaintiff-respondent's case cannot be true.

[6] The following is a translation of the operative part of the sanad, EX. A:

"Whereas Jhari Sahu Ram, son of Rijho Ram, deceased . . . . rendered faithful services by looking after cases, etc. I, the executant, being highly pleased with him, gave him 8 bighas of paddy and 5 bighas of tanr lands, in all 13 bighas in mauza Tilaiya, pargana Gumo, thana Kodarma, sub-registry Darahi, district registry and district Hazaribagh, which is free from all debts and encumbrances, as a perpetual Jagir grant, from this day onward. It is desirable that the said Jhari Ram should enter upon possession of the land, as per boundaries given below and enjoy the produce thereof peacefully and should look after the zamindari affairs faithfully and honestly and pay the annual cess of Re. 1-4-0 into my office. I have, therefore, executed this sanad of the Jagir grant by way or gift of my own accord, so that it may be of use when required.

The words 'Jagir Dowami' in the sanad have been translated as perpetual 'Jagir.' Mr. Sarjoo Prasad appearing for the appellants has contended that the contents of EX. A make the intention of the extecutant quite clear as to the nature of the grant. Mr. B. C. De appearing on behalf of the respondent has, on the other hand, contended that the words 'Jagir Dowami' mean a Jagir permanent in the life-time of the grantee and not a heritable estate. A number of decisions have been referred to by both the sides, but in not a single one of them their Lordships of the Privy Council or of the various High Courts had to consider the implication of the words "Jagir dowami." In one case reported in 7 Pat. 752[1] the meaning of 'thika dawami' fell to be considered. Their Lordships quoted with approval from the Settlement Report of Mr. Sifton (as he then was) that the status of dowami in the record-of-rights is restricted to cultivating tenancies which have grown into tenures. The lexicographical meaning of the word 'dowami' is 'lasting, continuing.' The word, therefore, connotes permanence. The question is, what sort of permanence is really meant. In 13 Beng. L. R. 124,[2] the meaning of the expression 'istimrari mukarrari' was considered. 'Mukarrari' means 'a fixed allowance, quit rent': *vide* Hindustani—English Dictionary by S. W. Fallon. The word 'istimrari,' according to the same authority, means 'perpetual, continuative, never ceasing.' The question that their Lordships of the Judicial Committee had to consider was whether 'istimrari mukarrari' means 'an estate of inheritance.' Their Lordships held that the expression 'istimrari mukarrari' might mean either permanent during the life of the grantee or permanent as regards hereditary descent. This view was re-affirmed and amplified in 12 Cal. 117.[3] If the words 'istimrari mukarrari' cannot unequivocally refer to a hereditary interest, then the word dowami also cannot refer to such an interest. Therefore, in my opinion, the mere mention of the word 'dowami' in the sanad, EX. A, does not carry the case of the defendants-appellants very far. The sanad besides making mention of the word 'dowami,' also uses the word 'gift.' The whole of the instrument is in Hindi, but the English word 'gift' has been used therein. At one place it is said that this will be a Jagir dowami and at another place it is mentioned that the Jagir will be by way of a gift. The meaning of the crucial word 'dowami' not being quite clear as already pointed out it cannot be said that the real intention of the grantor is quite apparent on the face of the document. Where such is the case, one has to look to other relevant circumstances to find out the real intention. The circumstances under which the instrument was executed thus become important. So also the other terms of the instrument and the subsequent conduct of the parties. First of all I shall deal with the other terms of the instrument. A remarkable feature of the document is the total absence of any of the familiar expressions like '*ba farzandan, al aulad* and *putra pautradi*' which we usually associate with instruments by which heritable rights are conferred. They are indeed not essential, but they are usually met with in some form or other. The sanad, EX. A, contains a desire of the grantor that Jhari Ram should come into possession and enjoy the usufruct. If a heritable estate was meant, then one would have expected a mention of the fact that, the grantee and his descendants will continue to enjoy subject-matter of the grant without any let or hindrance.

[7] Next, I shall refer to the circumstances under which the sanad was granted. It is recited in the sanad, EX. A, that the jagir is granted because of past services. It is further added that in future also Jhari Ram, the grantee, will continue to render services. There is no evidence

that Jhari Ram was actually servant of the grantor. On the side of the plaintiff it was said in evidence that Tikait Fateh Narain wanted to utilise the services of Jhari Ram and that he accordingly granted the sanad to him (Jhari Ram). The plaintiff's case further was that Jhari Ram rendered service so long as he was alive. The case of the defendants-appellants, on the other hand, was that Jhari Ram helped the Tikait in the case brought by Akbar Ali by advancing a loan to him. Entries in some bahi khatas were exhibited in this case to show that the Tikait was indebted to Jhari Ram. Kashi Ram (D. W. 7) son of Jhari Ram, in his deposition has said that the only concern that his father had with the late Tikait was that he lent money to the Tikait. There is no evidence to show that Jhari Ram advanced loans on any particularly favourable terms. There is also no evidence as to what Jhari Ram exactly did in connection with the case brought by Akbar Ali, save and except this that he advanced some money and thereby saved some property of the Tikait from sale. The relationship between the Tikait and Jhari Ram was, thus, one of creditor and debtor. This is an important circumstance to be borne in mind. However, much a debtor may feel obliged to his creditor, it is unlikely that he (the debtor) will permanently deprive himself of his property in favour of the creditor to repay his debt of gratitude. In this connection it will not be out of place to refer to the evidence regarding the means of the late Tikait. Fakira Lall (P. W. 1) is a very old servant of the Tikait's family. We learn from him that the plaintiff-respondent has got two villages, the annual income of which was Rs. 2000 before survey and Rs. 4000 since the survey. We also get from the same witness that in 1964 Sambat, which will correspond to 1907 A. D., the Tikait was indebted to the extent of Rs. 20,000. Tikait Dwarka Narayan Singh (P. W. 5), the plaintiff, had deposed to the effect that the debt amounted to Rs. 55,000. Fakira Lall had further deposed that when the Tikait called Jhari Ram in 1968 Sambat (1911 A. D.) he told him (Jhari Ram) that he will not be able to pay him any salary. This shows that the financial position of the Tikait was far from satisfactory when the sanad was executed. It does not stand to reason that the Tikait circumstanced as he then was will execute a permanent sanad in favour of Jhari Ram, as contended on behalf of the defendants-appellants.

[8] The subsequent conduct of the parties is also relevant in this case, as pointed out above. The importance of such conduct was emphasised by Lord Sugden in his oft-quoted lines—'Tell me what you have done under such a deed and I will tell you what that deed means,' occurring in (1842) 1 Dr. & War 353.[4] I may refer to Exs. 1 and 4. Exhibit M is an objection by Jhari Ram under Ss. 83 (1) and 111 (6), Chota Nagpur Tenancy Act before the Survey authorities. The relief sought was that the plots covered by Ex. A might be entered as a perpetual jagir and not as a mere service tenure. Exhibit 4 is the decision of the Survey Officer. It is dated 18-7-1913. This decision is of some importance. The sanad in question was produced before the officer. The following few lines from Ex. 4 are important :

"A registered Sanad is also produced in support of the claim. The Sanad clearly stated that it is a Jagir gift but there is also a stipulation to the effect that the grantee will continue rendering such services. Fakira Lall who represents the defendant states that the lands are liable to resumption on the objector's stopping to render services. The first party does not deny this. The Sanad is, however, not very clear. When there is no dispute about the resumability I allow a Jagir Khewat to the objector with resumable rights."

On behalf of the defendants-appellants it has been contended that Jhari Ram was represented by one Chetlal, during the survey proceedings and that this Chetlal, being a brother of Fakira Lall (P. W. 1) an old servant of the plaintiff-respondent, played him false and might have made an admission which was detrimental to the interests of Jhari Ram. It is to be noted that Ex. M, the objection petition, was signed by Jhari Ram himself. At the time of the actual hearing of the objection petition, Jhari Ram might not have deen present, but it is difficult to believe that he remained ignorant of the order that was passed. No steps appear to have been taken by Jhari Ram to have the survey entry corrected. Referring to the evidence of Kashi Ram (D. W. 7), one of the defendants, I find that there was a partition in the family of the defendants in 1924 or 1925 in the presence of Chetlal. Chetlal obviously continued in the service of Jhari Ram long after the survey proceedings were over. If he had acted against the interests of his master during the survey proceedings of 1913, is it likely that he would be retained in service in 1924 or 1925? There are clear indications in the record to show that there was some sort of compromise between the parties about the time of survey. Exhibit 2 is the khewat of the village, and Ex. 3 is the khatian. Exhibit 2 shows that only 4.29 acres of land out of the area covered by Ex. A is in possession of Jhari Sah (same as Jhari Ram.) The total area of 13 bighas will be much more than 4.29 acres. There is no clear evidence as to what happened to the rest. On behalf of the defendants-appellants it was stated that as some of the lands were *tanr* (high land). Jhari Ram did not care for them. The khewat makes clear mention that the tenure is resumable.

[9] Another circumstance showing conduct is the execution of the deed of gift (EX. L) and the deed of endowment (EX. K). It may be said that Jhari Ram could not have parted with the jagir land in this way if he knew that the grant was for life only. If the attendant facts are closely examined it will be clear that this conduct of Jhari Ram was not a *bona fide* one. In the first place both the documents were executed on the same day. In the next place the beneficiaries were members of his own family. The deed of gift was, as already stated, in favour of his wife. The other document makes clear mention of the fact that the entire management of the dedicated property will remain in the hands of Jhari Ram and his family. Lastly, under the two deeds Jhari Ram disposed of all the 4.29 acres of the jagir lands of which he was recorded in the Survey as evidenced by the Khewat and Khatian, Exts. 2 and 3 respectively. Exhibit L recites that Jhari Ram was old in 1931. He must have known that in view of the entry in the Survey Record of Rights dispute regarding the jagir land was bound to crop up after his death. He therefore made haste to execute the two documents in question. If this conduct shows anything it shows that Jhari Ram apprehended that there was trouble ahead.

[10] The suit out of which the present appeal arises was filed in 1941. It may be asked why the plaintiff waited for about 6 years before he instituted the suit. No adverse inference should be drawn against him from this because he could file his suit any time within the statutory period of limitation.

[11] In my opinion the appeal is without any merit, and would dismiss it accordingly. In the circumstances of the case each party will bear his own cost of this Court.

[12] **Manohar Lall J.** — I am also of the same opinion, but wish to make a few observations as to the construction which should be placed upon the document of jagir grant. It is apt to draw attention to the observation of Lord Davey in 26 I. A. 216[5] at p. 225 :

"Whether the use of this word (that is to say, dawami) necessarily imports a perpetual hereditary interest, or whether, notwithstanding the use of the word 'dawami,' it may be held that upon the considerations of the object and provisions of the pottah as well as the surrounding circumstances the intention to grant a perpetual lease does not sufficiently appear, is a question of some difficulty."

The document in the present case has the word 'dawami' which does not necessarily import lasting beyond the life of the grantee. The words *naslan bad naslan and batlan bad batlan* are conspicuous by their absence in this grant. We are, therefore, forced to consider the object and provisions of the patta as well as the surrounding circumstances in order to find out whether the intention was to grant a lease lasting beyond the lifetime of the grantee. That this was so, does not sufficiently appear. I am not in agreement with the argument of the Advocate-General that upon the construction of the patta itself it must refer ambiguously to a perpetual grant to be enjoyed by the grantee and his heirs. The surrounding circumstances and the object of the grant have been fully considered by my learned brother, and I agree with his reasonings and conclusions.

[13] There is a further difficulty in the way of the appellants namely that the survey record of rights distinctly states that after the dispute between the parties had been settled it was agreed that the possession of the grantee over a part of the lands which were the subject of the original grant would be considered for his lifetime only—he gave up his rights to the remaining. The entry in the record of rights must be presumed to be correct and unless it is displaced by evidence to the contrary, the appeal must fail : *see* the Privy Council cases in 13 Pat. 589[6] and 12 P. L. T. 319.[7] If the evidence and the circumstances disclosed in the evidence leave us in doubt as to the true import and meaning of the grant (which I have already stated is ambiguous), the plaintiff must succeed as the survey record of rights is in his favour. It is also to be observed that the parties gave a go-by to the original grant as in the survey record of rights the ancestor of the defendant was entered as in possession not over the whole area covered by the original grant but of a portion only. The learned Advocate-General drew out attention to the fact that in the survey record of rights reference is made to the title deed of the defendant's ancestors based not on any new arrangement between the parties but to the original document of the jagir grant. In my opinion, however, the reference to the original document was made by the survey authorities for the sake of convenience to show how the defendant originally came to acquire the rights in the properties. But as there was a dispute between the parties and the dispute was settled, as expressly stated by the survey officer by the defendant's ancestor agreeing to be recorded as in possession of a resumable grant, it is no longer open to the appellant to argue that we must ignore the whole of those proceedings which as I have said are clearly stated in the order of the Settlement officer.

[14] For these reasons, I am of opinion that the appeal fails and must be dismissed, and in the circumstances each party should bear his own costs in this Court.

D.H. *Appeal dismissed.*

## A. I. R. (35) 1948 Patna 337 *[C. N. 119.]*

SINHA AND MUKHARJI JJ.

***The Registrar Co-operative Societies, Bihar and others*** — *Appellants* v. *Raghubir Ram and others* — *Respondents.*

A. F. A. D. No. 1750 of 1945, Decided on 11-9-1947, from decision of Sub-Judge, 2nd Court, Arrah, D/- 13-8-1945.

**Bihar and Orissa Co-operative Societies Act (6 [VI] of 1935), S. 57 (2) and (3) — Applicability — Award by liquidator making person liable as surety of member of society under liquidation — Suit to declare award as ultra vires — Leave of Registrar is necessary.**

**Sub-section (3) of S. 57, cannot be interpreted to mean that where an order passed by a liquidator is challenged on the ground that it was passed without jurisdiction, no leave of the Registrar is necessary under sub-s. (2). Reading sub-ss. (2) and (3) together it is clear that whatever may be the scope of the suit or legal proceeding that may be instituted against a liquidator as such, the leave of the Registrar will be necessary. Thus, where a person institutes a suit against a liquidator as such for a declaration that an award passed by the liquidator to the effect that the person who was a surety for one of the members of the society under liquidation was liable for the amount for which he was a surety was ultra vires and ineffective, leave of the Registrar under sub-s. (2) is necessary and sub-s. (3) can be of no avail: 1944 P. W. N. 172, *Ref.*** [Para 6]

*Cases referred:*—

1. ('44) 1944 P. W. N. 172, Shamji Lire v. Central Co-operative Bank Ltd.
2. ('35) 15 Pat. 246 : 23 A. I. R. 1936 Pat. 87 : 160 I. C. 915, Secy. of State v. Kameshwar Singh.

*Sarjoo Prasad, Girijanandan Prasad and Shyam Behari Prasad* — for Appellants.

*D. N. Varma, A. B. N. Sinha and M. Rahman* — for Respondents.

**Mukharji J.**—This is defendants' second appeal against a judgment of reversal. The plaintiff, Raghubir Ram, respondent 1 in this second appeal, brought a suit against the Registrar of Co-operative Societies and others for a declaration that a certain award obtained by defendant 4 who was a liquidator was illegal, ineffective and liable to be set aside. There wás an alternative prayer that the property belonging to the plaintiff and sold by the liquidator might be returned to the plaintiff on payment of Rupees 297/5/- for which the property had been sold.

[2] The case of the plaintiff-respondent may be briefly stated as follows: There was a Central Co-operative Bank at Buxar and this had gone under liquidation. Defendant 1 the Registrar of Co-operative Societies in Bihar, appointed defendants 2 and 3 the Official Liquidators for the discharge of the duties of the Bank. Under the said Central Co-operative Bank there was a Co-operative Society in Belaon, *thana* Nawanagar. The Official Liquidators took possession of the assets of this Society. Defendant 4 was the liquidator for this Society at the beginning, but defendants 2 and 3 subsequently took charge from him. One Yusuf Mia was a member of the aforementioned Belaon Co-operative Society. He had taken a loan from the Society and the name of the plaintiff appears in the books of the Society as surety for this Yusuf Mian although as a matter of fact he did not offer himself as such. Defendant 4, as liquidator determined the contribution payable by the plaintiff without giving the plaintiff the notice to which he was entitled. Rs. 297/5 was the contribution thus fixed. Later on the order of the liquidator was executed and the property of the plaintiff was put up for sale. Having come to know of the impending sale and in order to save his property worth Rs. 3000 the plaintiff approached the registrar and offered to pay the amount of Rs. 297/5 to the department. The Co-operative department allowed the matter to drag on until at last the property of the plaintiff was sold and it was purchased by the liquidator. After the sale defendant 1 the registrar, agreed to return the property to the plaintiff if the latter made full payments of all his dues to the Co-operative department. The plaintiff was all along willing to pay the amount, but the defendants backed out of the contract and did not restore the property to the plaintiff. Failing to obtain any remedy at the hands of the defendants, the plaintiff served a notice on them under S. 80, Civil P. C. Cause of action according to the plaintiff accrued for the first time on 24th January 1940 when the award was prepared.

[3] The suit brought by the plaintiff-respondent was contested by all the defendants who filed separate written statements. It was denied that the plaintiff had any cause of action. The allegation in the plaint that the name of the plaintiff was fraudulently inserted in the loan register of the Society was denied. It was further case of the defendants that the liquidator determined the question of contribution after giving full opportunity to all persons concerned. It was also the defence case that there was no completed contract for the return of the property sold at the instance of the liquidator. Upon the pleadings of the parties the learned Munsif who tried the suit framed three issues of which the first was whether the award dated 24th January 1940 is illegal and liable to be set aside. The second issue was whether the plaintiff is entitled to get back the properties in suit after payment of Rs. 297/5. The last issue was whether the plaintiffs are entitled to any reliefs.

[4] The learned Munsif came to the conclusion that notice was served on the plaintiff and that he was given an opportunity of being heard before the award was passed. So far as the question of recovery of possession of the property in suit was concerned, the position was like this. On the date the suit was taken up for hearing

the plaintiff filed an amendment petition to the effect that a decree for recovery of possession as also a decree for mesne profits might be passed after realizing proper court-fees. It was found that the value of the property in question came to Rs. 3000 to Rs. 4000. If the suit was to be valued at Rs. 3000 or Rs. 4000 then the learned Munsif could not try it because in that case it would have been beyond his pecuniary jurisdiction. The plaintiff thought it best not to press his prayer for amendment and so the question of any amendment of the plaint ended there. In the result, the learned Munsif dismissed the suit of the plaintiff with costs. The plaintiff thereafter filed an appeal which was heard by the second Subordinate Judge of Arrah. The learned Subordinate Judge held that the suit was maintainable. It was argued before him that in view of the provisions of S. 57 (2), Bihar and Orissa Co-operative Societies Act, the suit could not be maintained. This contention was negatived. As for the question as to whether there was a completed contract or not, the learned Subordinate Judge found against the plaintiff. The learned first lower appellate Court also found that no notice was served on the plaintiff in the award proceedings and for this reason he held that the liquidator had no jurisdiction to pass the award in question. Point No. 3 before the learned Subordinate Judge was whether the plaintiff stood surety for Yusuf Mian for the repayment of the loan taken by the latter. The finding is in favour of the plaintiff. The learned Subordinate Judge allowed the appeal with costs : Hence this second appeal.

[5] At the time of the hearing of the appeal a registered post card was produced to show that notice as contemplated by S. 44 (3) (8), Bihar and Orissa Co-operative Societies Act, was actually issued, but that the same was refused by the addressee. In the absence of the evidence of the postal peon the registered post card cannot be accepted in evidence to show that it was actually refused.

[6] The learned Advocate for the appellants took his stand on S. 57 of the Act and contended that under sub-s. (2) of that section a suit could be brought only by leave of the Registrar and subject to such terms as he might impose. The learned Advocate for the respondents, on the other hand, relied on sub-s. (3) of S. 57. Sub-section (1) of S. 57 provides that :

"Save in so far as is expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of any matter concerned with the winding up or dissolution of a registered society under this Act, or of any dispute required by S. 48 to be referred to the registrar."

Then comes sub-s. (2) which reads as follows :

"While a society is in liquidation no suit or other legal proceeding shall be proceeded with or instituted against the liquidator as such or against the society or any member thereof on any matter touching the affairs of the society, except by leave of the Registrar and subject to such terms as he may impose."

In the present case respondent Raghubir Ram instituted a suit against the liquidator appointed by the Registrar and the suit was against the liquidator as such. Further, it was a suit in which there was a prayer for a declaration that a certain award passed by the liquidator was *ultra vires* and ineffective. The award was to the effect that respondent Raghubir Ram who was a surety for one of the members of the society under liquidation was liable for the amount for which he was a surety. Thus all the requirements of sub-s. (2) of S. 57 are there and therefore one would think that the leave of the Registrar was necessary. Let me now turn to sub-s. (3) of S. 57 to see whether according to the provisions of this sub-section it was not incumbent upon Raghubar Ram to apply for the leave of the Registrar. Sub-section (3) may also be quoted in full :

"No order of the local Government, District Judge, Registrar, a person appointed to assist the Registrar, liquidator, or an arbitrator or arbitrators purporting to be one, which under any provision of this Act is declared to be final, shall be liable to be challenged, set aside, modified, revised, or declared void in any Court, upon merits or upon any ground whatsoever except want of jurisdiction."

The argument that has been advanced on behalf of the respondents is that where an order passed by a liquidator is challenged on the ground that it was passed without jurisdiction, no leave of the Registrar is necessary. I do not think sub-s. (3) of S. 57 can bear an interpretation like this. This sub-section merely says that certain orders passed by certain authorities including a liquidator cannot be challenged on any other ground except that such an order was passed without jurisdiction. Sub-section (3) merely restricts the scope of the legal proceeding that may be taken to avoid the effect of certain orders passed by certain authorities including a liquidator. Sub-section (2) clearly lays down that no suit or legal proceeding is to be proceeded with or instituted against the liquidator as such on any matter touching the affairs of the society under liquidation except by leave of the Registrar and subject to such terms as he may impose. Sub-section (3) refers to certain orders which under the Act itself have been declared to be final. Section 44 (6) provides that the orders of the liquidator, subject to any order of the District Judge on appeal shall be final. Similarly S. 48 which deals with disputes provides in sub-s. (9) as follows :

"Save as expressly provided in this section, a decision of the Registrar under this section, and subject to the orders of the Registrar on appeal or review, a decision

given in a dispute transferred or referred under cl. (b) or (c) of sub-s. (2), shall be final."

All that sub-s. (3) of S. 57 lays down is that orders which are declared to be final under the Co-operative Societies Act can be challenged only on the ground of want of jurisdiction. Sub-section (2) of S. 57 refers to any suit or legal proceeding that can be instituted against the liquidator as such. Reading sub-ss. (2) and (3) together it is not difficult to see that whatever may be the scope of the suit or legal proceeding that may be instituted against a liquidator as such the leave of the Registrar will be necessary. If leave is refused no suit or legal proceeding can be instituted. In 1944 P. W. N. 172,[1] during the pendency of an appeal against a Co-operative Bank the latter went into liquidation and the liquidator was made party respondent and the appellant applied to the Registrar under S. 57 (2), Bihar and Orissa Co-operative Societies Act for leave to proceed with the appeal; but the permission was not given. It was held that the appeal was not maintainable. In the reported case the plaintiff, who was a contractor, sued for money which according to him was due to him from the Central Co-operative Bank Ltd. of Sitamarhi. When the suit was brought there was no question of any liquidator, but it was during the pendency of the appeal that the Bank went under liquidation and a liquidator was appointed. The circumstances of the present case are of course different from those of the reported case, but for the reasons already given, I am inclined to think that sub-s. (2) of S. 57 has full application to the facts of the present case. Permission of the Registrar was necessary. Sub-section (3) of S. 57 can be of no avail to the plaintiff-respondent. In this view of the matter, the suit of the plaintiff was not maintainable and it should have been dismissed.

[7] The appeal is allowed and the judgment and decree of the learned first appellate Court are set aside. The plaintiff's suit stands dismissed. In the special circumstances of the case, however, the parties will bear their costs throughout.

[8] **Sinha J.** — The crucial question upon which the decision of the appeal hinges is whether the suit giving rise to this appeal, instituted without the leave of the Registrar of Co-operative Societies, is maintainable in view of the provisions of S. 57, Bihar and Orissa Co-operative Societies Act, 6 [VI] of 1935. As there are no precedents to guide us in the determination of this question, it is necessary to examine in detail the relevant provisions of the Act in order to appreciate the position. Under S. 40 of the Act, the Registrar is empowered to determine whether any person, who had taken any part in the organization or management of a society governed by the Act, shall be liable to compensate the society in circumstances contemplated by that section. Such determination by the Registrar is declared to be final subject to the result of an appeal to the Provincial Government, and the orders of the Provincial Government on an appeal from the Registrar's orders are also declared to be final. In Chap. 6, relating to supersession of managing committees and dissolution of registered societies, the Registrar has been empowered by S. 41 to dissolve the managing committee of a society, and such an order has been declared final subject to the result of an appeal to the Provincial Government, and the orders of the Provincial Government on an appeal from the Registrar's order have also been declared to be final. By S. 42, the Registrar has been empowered to order the winding up of a registered society. His orders under S. 42 are liable to an appeal to the Provincial Government under S. 43, and, subject to the result of such an appeal, his orders are declared to be final, and in the event of an appeal to the Provincial Government, their orders are declared to be final. Under S. 44, the Registrar has been empowered to appoint a liquidator after he has passed an order for the winding up of a registered society. Such a liquidator has been vested with very wide powers of disposal of the assets of the society, of liquidation of its liabilities, of instituting and defending suits on behalf of the society, as also of doing such other acts as may be necessary for determining the assets and liabilities of the society. Under sub-s. (5) of S. 44, an appeal may lie to the Court of the District Judge from certain orders of the liquidator, enumerated therein, with the special sanction of the Registrar. The Registrar has also been given powers of revision in respect of order passed by the liquidator of a registered society. The orders of the liquidator unless revised by the Registrar, and of the Registrar passed in his revisional jurisdiction, and of the District Judge in the event of an appeal as aforesaid have been declared to be final by sub-s. (6) of S. 44. Section 48 contains provisions for the reference to the Registrar of any disputes amongst members, past members or their representatives-in-interest or between them on the one hand and the society, its managing committee or any officer, agent or servant of the society on the other, or between the society and any other registered society. On such a reference, it is open to the Registrar to decide the dispute himself or to transfer the case for decision by any other officer exercising the powers of a Registrar in that behalf or to an arbitrator or arbitrators. By sub-s. (5) of S. 48, the tribunal deciding the matter is authorized to pass "a mortgage award which shall have the same force as a mortgage decree

of a competent civil Court," and, by sub-s. (6) of that section, provision is made for an appeal to the Registrar from the decision of the arbitrator or arbitrators or of the authority to whom the Registrar may have transferred the case. The Registrar is also vested with inherent jurisdiction to review orders passed by him or by other authorities on a reference by him. By sub-s. (8) of the section, the Registrar is empowered to state a case, and refer it to the District Judge for decision, and the decision of the District Judge, on such a reference, is declared to be final. Similarly, by sub-s. (9) of the section, the decision of the arbitrators or of the tribunal, to whom the Registrar may have transferred the case for disposal, is declared to be final subject to the orders of the Registrar on appeal or review which, in its turn, is declared to be final subject to the orders of the Registrar on appeal or review which, in its turn, is declared to be final. For the purposes of determining the matters within their respective jurisdictions, the liquidator, the arbitrators, or any other authority exercising the powers of a Registrar, and the Registrar himself have been vested with the powers of a civil Court to summon and enforce the attendance of witnesses and parties concerned, and to examine them upon oath, and to compel the production of any books, documents, etc., as if they were civil Courts functioning under the Civil Procedure Code.

[9] It will thus appear that the liquidator, the arbitrator or arbitrators, the Registrar or an officer discharging his functions, and ultimately, the Court of the District Judge have been vested with wide powers of determining the assets and liabilities of the society in question, and, in doing so, of determining the liabilities of members or of past members or their legal representatives to the society, and their decisions have been declared to be final subject, as aforesaid, to the result of an appeal provided by the Act itself. Similarly, certain orders of the Registrar in the matter of supersession of managing committees or of dissolution of registered societies or of the amount of compensation to be paid by the servants or agents of the society have been declared to be final subject to the result of an appeal to the Provincial Government whose orders are ultimately declared to be final. It would, therefore, appear that the Legislature has intended to provide for a special machinery which should deal with matters of civil nature speedily and finally—matters which would ordinarily be entertainable by the ordinary civil Courts in accordance with the elaborate procedure laid down in the Civil Procedure Code. It is settled by decisions of this Court and of the Judicial Committee of the Privy Council that, where a special machinery has been provided for adjudication of certain civil disputes, and the decision of that tribunal has been declared to be final, the jurisdiction of the civil Courts is barred : *vide* 15 Pat. 246.[2] The sections of the Act discussed so far make it clear beyond doubt that the decision of the tribunals created by the Act was intended to be final; but the Legislature has provided further and enacted S. 57 relating to the bar of jurisdiction of the civil Courts. Sub-section (1) of S. 57 lays down an absolute bar in respect of matters specifically referred to in that sub-section. Sub-section (2) of that section lays down a conditional bar to the institution of suits against the society, or any member thereof, or against the liquidator as such, during the pendency of the liquidation proceedings in respect of any matter touching the affairs of the society, "except by leave of the Registrar and subject to such terms as he may impose." In the present case it is not claimed that the leave of the Registrar has been obtained : On the other hand, the indications in the record are that such a leave was prayed for and refused. But it is contended on behalf of the plaintiff-respondent in this Court that sub-s. (3) of S. 57 comes to his rescue. The question is whether sub-s. (3) of S. 57 permits a suit against the liquidator of the registered society to be instituted without the leave of the Registrar, because it is alleged in the plaint that the award of the liquidator against the plaintiff was without jurisdiction, the ground alleged being that the plaintiff had not been given notice of the proceedings. The learned Munsif, who tried the suit in the first instance, came to the conclusion that the plaintiff had such a notice. The lower appellate Court has come to the contrary conclusion. The appellants have offered to adduce additional evidence to substantiate their allegation that the plaintiff had been given the usual notices as required by the Act. But, in my opinion, the question of admitting additional evidence at this stage need not be gone into, though, in my opinion, there are grounds worth considering for taking such a course. In the view I take of the legal position, it is not necessary to go into that question. In my opinion, sub-s. (3) does not control the provisions of sub-s. (2) of S. 57. Sub-section (2) prohibits a suit or legal proceeding against the liquidator, or the society, or any member thereof, on any matter touching the affairs of the society unless the leave of the Registrar has been obtained for the institution of such a suit or proceeding. On the other hand, sub-s. (3) declares again the finality and conclusiveness of the order of the Provincial Government, the District Judge, the Registrar, the liquidator and other tribunals created by the

Act, which have been declared final according to the provisions of Ss. 40 to 44 and 48, as the case may be, and sets out one single ground, namely, "want of jurisdiction" on which such an order may be "set aside, modified, revised, or declared void in any Court." In other words sub-s. (3) restricts the grounds on which such final orders of the authorities created by the Act as aforesaid may be challenged, not *in limine* but subject to the restriction as regards the leave of the Registrar in such cases as are within the purview of sub-s. (2) of S. 57. It is clear, therefore, that the two sub-sections deal with entirely different matters, one laying down the necessity of the leave of the Registrar in certain specified cases (like the present), while the other declaring the single ground on which the final orders of the authorities created by the Act may be challenged. Hence, it is true to say that a suit brought with the leave of the Registrar as contemplated in sub-s. (2) may fail if the ground of "want of jurisdiction" is not made out. But a suit in which that ground is made out will fail on the ground of maintainability, in the absence of the necessary leave of the Registrar.

[10] In this view of the matter, it is not necessary to consider the further question whether non-service of notice on the plaintiff (assuming that the finding of the lower appellate Court that there was no notice to the plaintiff is correct) can come within the purview of sub-s. (3) of S. 57. If notice is issued but not served either by the negligence of the serving peon or on account of mistaken identity, that circumstance may not attract the provisions of sub-s. (3). In my opinion, it is only in cases where the statutory notice is not issued at all that the question of "want of jurisdiction" can arise. But this matter need not be pursued further in view of the conclusion I have already arrived at in agreement with my learned brother that the absence of the necessary leave of the Registrar vitiates the entire proceedings in this suit, which must be dismissed on that ground alone. On these grounds, I agree with my learned brother that the appeal should be allowed and the suit dismissed but without costs in the circumstances.

V.R. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 341** *[C. N. 120.]*

REUBEN AND MUKHARJI JJ.

*Saradindu Gangopadheya — Appellant* v. *Nirmal Nalini Devi and another — Respondents.*

A. F. A. D. No. 83 of 1946, Decided on 17-10-1947, from decision of Addl. Dist. Judge, Dumka, D/- 5-2-1946.

**Succession Act (39 [XXXIX] of 1925), S. 2 (h) — Document held not will but deed of dedication.**

In order to construe a document one should look to the document itself. If it is not clear, then the intention of its author is to be gathered from the surrounding circumstances. Where the language is plain and unambiguous the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction. The document should be construed as a whole. The question of construing it in parts can only arise if read as a whole the document gives rise to inconsistencies and absurdities : 1900 A. C. 260 and 8 A. I. R. 1921 P. C. 89, *Rel. on.* [Paras 6 and 7]

A document was executed by a barely literate lady in Bengali. The first part of it related to the dedication of all the properties movable and immovable which belonged to the lady on the date the document was executed. The language of the document made it clear beyond any doubt that the dedication was to take effect immediately if it had not already taken effect. The second part of the document related to the appointment of shebaits :

*Held*, that the mere mention of the word "will" would not make a document a testamentary one if really it is not so. No doubt a document could be partly a will and partly of a non-testamentary character. But the second part could not be construed as a will because the shebait could not alienate shebaitship by will. According to the definition of "will" the property which the testator disposes of by his will must remain his property at the time of his death, or must remain his property when the terms of the will are given effect to. A shebait holds his office for his life. If he can alienate shebaitship, he can do so during his life time. The document could not therefore be construed as a will: *Case law referred.* [Paras 6, 7]

One of the real tests of a valid will is whether it is revocable. If a document is such that it cannot be revoked, it cannot be called a will in the real sense of the term. The lady made no such reservation in the alleged will. After having laid down the line of succession to shebaitship it was not open to her to effect any change even if she wanted to do so. In this view of the matter also the document in question could not be construed to be a will. [Para 10]

*Cases referred:*—

1. (1900) 1900 A. C. 260 : 69 L. J. Ch. 516 : 82 L. T. 429, North Eastern Rly. Co. v. Lord Hastings.
2. ('21) 25 C. W. N. 511 : 8 A. I. R. 1921 P. C. 89 : 58 I. C. 228 (P. C.), Tirugnanapal v. Ponnammal Nadathi.
3. (1846) 115 E. R. 1041, Doe v. Cross.
4. ('15) 26 I. C. 363 : 2 A. I. R. 1915 Mad. 930, Venkata Subbarayadu v. Pullamma.
5. ('08) 35 Cal. 226, Rajeshwar Mullick v. Gopeshwar Mullik.
6. (05) 32 Cal. 1082, Chaitanya Gobind v. Dayal Gobinda.
7. ('27) 46 C. L. J. 145: 14 A. I. R. 1927 Cal. 756 : 105 I. C. 12, Umacharan v. Rakhal Das.
8. ('23) 50 Cal. 197 : 10 A. I. R. 1923 Cal. 30 : 70 I. C. 175, Gouri Kumari Dasee v. Ramanimoyi Dasee.
9. ('36) 17 P. L. T. 253 : 23 A. I. R. 1936 Pat. 250 : 162 I. C. 486, Janki Das v. Kalu Ram.

*Dr. D. N. Mitter and A. K. Mitter* —for Appellant.

*L. K. Jha, U. N. Sinha and S. R. Ghosal* —for Respondents.

**Mukharji J.** — This is a first appeal by one Saradindu Gangopadhya whose application for the grant of probate in respect of a document which, according to him is the will of a lady named, Jagat Tara Debi, has been rejected by

the learned Additional District Judge of Dumka (Santal Parganas). The document in question is Ex. 1, and it has been printed at p. 32 of the paper-book.

[2] The application for probate was filed on 2-8-1944, the testatrix died on 6-7-1944 at Deoghar which was her fixed place of abode. According to para. 3 of the application for probate, the appellant is the shebait named in the will and is also the executor by implication. The amount of assets which is likely to come to the petitioner's hand is Rs. 22,650 8-0: *vide* para. 4 of the application for probate. The details of the assets are set forth in annexure A of the will. In the first place there was a prayer that a probate of the will might be granted. There was an alternative prayer that if the petitioner was not entitled to get a probate of the will, then letters of administration might be granted with the will annexed thereto. The properties mentioned in annexure A included both movable and immovable properties. Among others there is a brick built house valued at Rs. 10,000.

[3] The main objector was Nirmal Nalini Devi. She is the widow of a deceased son of the testatrix. Another objector was Birendra Nath Pandey who is the son of one Bidhu Bhusan Pandey, a deceased brother of Kali Prasanna Pandey, the husband of Mt. Jagat Tara Debi, the testatrix. The genuineness of the will was called in question by the objectors. According to them even if it is genuine, it is not a will. The title of the testatrix to the properties mentioned in annexure A, already referred to and her right to dispose them of were challenged by the objector Nirmal Nalini Devi in para. 6 of her objection petition. In para. 8 and the subsequent paragraphs some serious allegations were made against the present appellant. Upon the pleadings of the parties, the learned Additional District Judge framed issues which are to be found at p. 16 of the paper-book. These are as follows : (1) Is the document alleged to be the last "will" of Jagat Tara Devi, a "will" within the meaning of the Succession Act ? (2) Is the document genuine and duly attested ? (3) Can a probate or letters of administration with a copy of the alleged "will" annexed thereto be granted to the applicant ?

[4] The above issues were framed on 30-5-1945. The learned Additional District Judge by his order dated 5-2-1946 held that "the application cannot be admitted to probate." The application was accordingly dismissed, but without costs. Hence this appeal.

[5] Before I proceed further, I may refer to the contents of the alleged will. The document is in Bengali and purports to have been written by the lady herself. The handwriting will suggest even to a casual observer that the writer was barely literate. The English translation of the will is to be found at p. 32 of the paper-book and it is as follows :

"I, this day, in a state of sound health, and mind, dedicate to Goddess Kailashri Mata whatever movable and immovable properties I possess. My relatives have no right whatsoever to interfere with this property and no one shall be competent to gift away or sell this property. After my death, my husband shall be the shebait. He shall not be competent to gift away or sell the same. After my husband's death Saradendu Gangopadhya shall be the shebait. I have got another debottar will drafted and the same is lying with the former Head Master of the Local school who is at present practising as a lawyer at Deoghar. I have not affixed my signature to it. The contents of that will were similar to those of this document. If I suddenly die this document shall be treated as my debottar will, and work shall be carried out in accordance with the directions mentioned in this document. I affix my signature and I exactly put down in writing what I have resolved in my mind. I have got no other will or document besides this document which I have executed and the unsigned and unregistered (will) which lies with the said lawyer. If I suddenly die, this document shall be treated as my debottar will. If my husband or my relations put obstruction in any way, it will not be accepted for all these houses, movable and immovable properties have been acquired out of my exclusive stridhan. My relations shall not be competent to interfere in any way with this debottar property and they shall not be treated as heirs of this property."

Srimati Jagat Tara Devi then affixed her signature and also the date. The first witness is her husband Kali Prasanna Pandey. His signature is preceded by the following endorsement.

"My wife has, this day, scribed this in her own handwriting and she has herself put down the signature."

Then there are three witnesses more including a doctor named Sourindra Nath Mukhopadhya. The present appellant Saradindu Gangopadhya also signed as one of the witnesses. The date put down by Srimati Jagat Tara Debi is 5-9-1939, while three of the witnesses signed on 7-9-1939.

[6] In order to fully appreciate the arguments advanced in this case regarding the true character of the document, Ex. 1, it is necessary to bear in mind the definition of the term 'will' as given in the Succession Act (Act 39 [XXXIX] of 1925). Section 2 (h) is as follows :

" 'Will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

The document, Ex. 1, can be divided into two parts. The first part of it relates to the dedication of all the properties movable and immovable which belonged to the lady on the date the document was executed. The language of the document makes it clear beyond any doubt that the dedication was to take effect immediately if it had not already taken effect. The words "*arpan karilam*" occurring in the document mean "I dedicate." Disposition of property *inter*

*vivos* cannot form the subject matter of a will. The second part of the document, EX. 1, relates to the appointment of shebaits. Dr. D. N. Mitter in his able argument has contended that shebaitship being a property, this part of the document should be construed as a will. Mr. L. K. Jha appearing for the other side accepts the position, but his contention is that the document in question should not be construed as a will. According to him, the document is nothing more than a deed of dedication in which the foundress indicates the line of succession so far as the shebaitship is concerned. Dr. Mitter has contended that a document may be non-testamentary in part and yet be admitted to probate. As regards his contention that shebaitship is a property, I need not refer to the various rulings that have been cited by him because, as already indicated, Mr. Jha accepts the position. The only question in this case is what should be the proper construction of EX. 1. It is a well established principle of law that in order to construe a document one should look to the document itself. If it is not clear, then the intention of its author is to be gathered from the surrounding circumstances. It is not the case of either party that the document, EX. 1, is vague or that it is couched in equivocal language. In 1900 A. C. 260,[1] their Lordships have laid down that where the language is plain and unambiguous the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction. A perusal of the document, EX. 1, makes it clear that the lady first of all dedicated her properties, and then laid down who should be the successive shebait. No doubt she makes use of the term 'will', but the mere mention of the word 'will' will not make a document a testamentary one if really it is not so. Their Lordships of the Judicial Committee have made this observation in 25 C. W. N. 511.[2] One is to remember that the document in our case was executed by a lady who apparently had very little education. It will be too much to suppose that she understood what is meant by will. One thing which is noteworthy is that wherever she has used the word "will" she has qualified it by the word 'debottur'. From this it is sufficiently clear that what was uppermost in her mind was that she was creating a debottur of her properties both movable and immovable.

[7] That a document can be partly a will and partly of a non-testamentary character does not admit of any serious doubt in view of reported decisions on this point. Williams in his Law of Executors and Administrators, Edn. 10, Vol. I, at p. 291, says that a will may be in part admitted to probate and in part may be refused. The learned author goes on to say that although this may be so, the Court even by consent cannot order a passage of the will to be expunged which the testator being of sound mind intended to form part of it. In 115 E. R. 1041,[3] a power of attorney was executed by a son serving in the Army in India in favour of his mother who was in England. According to the terms of the power of attorney the mother was to receive and hold the income from certain properties in England until the son should return. There was also a provision that if the son did not return to England, the mother will take the income. The document was acted upon and the son died in India without returning to England. It was held that the disposing part of the document constituted a will. In 26 I. C. 363,[4] there was a letter which in part effected immediate settlement. The rest of the letter related to the dispositions of property after the writer's death. The Madras High Court held that the latter part is a will. Instances like these could be multiplied. On the authority of the decisions just mentioned it was argued by Dr. D. N. Mitter on behalf of the appellant that the second part of the document, EX. 1, which relates to the appointment of shebaits after the death of Jagat Tara Debi should be treated as a will although the other part which creates an endowment may not be treated as such. Above I have stated that in the matter of the construction of a document one has to focus one's attention on the language of the document. Another important point to be remembered in such a case is that the document should be construed as a whole. Exhibit 1 which we are called upon to construe is quite a short document and was apparently written at one sitting. The question of construing it in parts could only arise if read as a whole the document gives rise to inconsistencies and absurdities. Let us first of all take the document as a whole and see what sense it conveys. In the opening lines the lady created a trust. She dedicated all her properties to the deity, known as Kailasbri Mata. After this, could the document stop short? Ordinarily speaking, the answer must be in the negative because whenever a religious endowment is created the founder or the foundress would like to lay down the line of succession to the office of the shebait. If a deed of endowment remains silent as to the future shebaits, the heirs of the founder become the shebaits. In EX. 1 after stating that the lady dedicates all her properties to Goddess Kailashri Mata she prescribes as to who the future shebaits of the deity will be. She of course does not say in so many words that she will herself be the first shebait, but her intention in this respect is sufficiently clear. She

states that after her death her husband will become the shebait and that on the death of her husband the present appellant will be the next shebait. The document further recites that the movable and immovable properties belonging to the lady are her stridhan properties and that neither her husband nor her relations have any right in these properties. The document read as a whole is a deed of dedication such as a Hindu lady will like to execute. Let me now separate the two parts of the documents from each other and see what result is obtained. We are asked to ignore the first part for the purposes of the present case because as already pointed out, the first few lines of the document deal with the immediate disposition of property. We must assume that a dedication has already taken place and the lady has already divested herself of her properties, because otherwise no question of shebaitship can possibly arise. The lady becomes the first shebait. Was it open to her to deal with her shebaity rights in the manner she is alleged to have done? The rights of a shebait were considered in 35 Cal. 226.[5] It was held in this case that a shebait is a manager or quasi trustee for the benefit of the idol. It was further held in this case that a shebait cannot alienate the hereditary office of shebaitship by will. Our attention has also been drawn to the case in 32 Cal. 1082.[6] In this case a shebait appointed a manager or shebait by a certain document. It was held that there was no testamentary disposition of the property belonging to the *akhra*. According to the definition of "will" the property which the testator disposes of by his will must remain his property at the time of his death, or must remain his property when the terms of the will are given effect to. A shebait holds his office for his life. If he can alienate shebaitship, he can do so during his life time and that again for good and sufficient reasons.

[8] In 46 C. L. J. 145[7] there was a provision for the appointment of a future trustee in a document and it was contended before their Lordships that this provision made the document a will. The contention was negatived. Their Lordships held that the document was not a will within the meaning of S. 2, Succession Act.

[9] In para. 5 of the application for probate the appellant has stated as follows :

"That your petitioner does hereby undertake to duly administer the property and credits of the said Jagat Tara Debi deceased and to make a full and true inventory thereof and to exhibit the same in this Court within six months from the date of grant of probate to him and also to render to this Court a true account of the said property and credit within 1 year from the said date."

The list of properties contained in annexure A is a fairly long one. Whether the document is construed as a whole or it is construed in parts the properties in question could not possibly belong to Jagat Tara Debi at the time of her death, because Ex. 1 clearly shows that whatever properties the lady had were dedicated to the deity. The statement of facts made in para. 5 of the application for probate runs counter to the case of the appellant that by Ex. 1 the lady disposed of the shebaity right only. I may also at this place refer to ground No. 4 of the grounds of appeal to this Court. There it is said that according to Ex. 1 there was no present dedication, but that the dedication was to come into effect on the death of the testatrix. In ground No. 5 a grievance is made of the fact that the learned lower Court did not take evidence. According to the appellant there was overwhelming evidence in his possession to prove that the lady treated the property as secular property even after the execution of the document and until her death. I have already shown above that the document makes it abundantly clear that the dedication took effect immediately and was not postponed. By the statement made in grounds Nos. 4 and 5 of the memorandum of appeal the appellant has really given away his whole case. If the lady continued to treat the properties as secular properties, then that fact can only show that Ex. 1 was never intended to be an effective document. The words "*arpan karilam*" in Ex. 1 can have only one meaning, namely, that the dedication was made by the lady in her lifetime when she executed the document Ex. 1. I have referred to all these above and I do not wish to say anything more.

[10] One of the real tests of a valid will is whether it is revocable. If a document is such that it cannot be revoked, it cannot be called a will in the real sense of the term. The question, therefore, is whether Ex. 1 could be revoked by the lady who is alleged to have executed it. In 50 Cal. 197[8] it has been held that the creator of a debottar trust is not entitled to make a change in the order of succession of shebaits unless he made a reservation to that effect in the deed of gift. The lady Jagat Tara Dabi, the executant of Ex. 1, made no such reservation in the alleged will. She clearly stated in the document which purports to be a will that on her death her husband will be the shebait and that when her husband dies the present appellant will be the next shebait. After having laid down the line of succession it was not open to her to effect any change even if she wanted to do so. In this view of the matter also, the document in question cannot be construed to be a will.

[11] The learned Additional District Judge did not take any evidence in this case and it

has been argued that this procedure was wrong. As according to the objectors the document propounded by the appellant is not a will, the learned lower Court considered this question and dismissed the case upon his finding that the document cannot be called a will. In ground No. 5 of the grounds of appeal it is stated, as already indicated, that the appellant had quite a mass of documentary evidence to show that Jagat Tara Debi continued to deal with her properties as if she was their sole owner. It will be taking upon rather an inconsistent position to say with one breath that in respect of Ex. 1 the ownership of the properties remained with Jagat Tara Debi and at the next breath to claim that by Ex. 1 Jagat Tara Debi disposed of the shebaity right. The clear recital in the document, Ex. 1, does not warrant a conclusion that the endowment was to come into being after the death of Jagat Tara Debi. In the circumstances of the case I am of opinion that the learned lower Court acted rightly in deciding Issue 1 regarding the real character of the document Ex. 1, before he took up any other issue. After the trial of Issue 1, it became altogether unnecessary to consider the other issues. In my opinion, this appeal is without any merit, and it must be dismissed, but in the circumstances of the case without any costs.

[12] **Reuben J.** — I agree to the order proposed by my learned brother. In my opinion the Additional District Judge was right in holding that the document in question is not a will. Dr. Mitter relied on the latter portion of the document as comprising a will relating to the sebaiti interest and cited several cases in which it was held that the same document was, as regards one portion of it, an instrument of a non-testamentary nature and, as regards another portion, a will. These were all cases in which it was possible to separate the document into two distinct parts. This is not the case here. Reading the document as a whole, one has to accept the construction placed on it by my learned brother, namely that in the first portion the lady dedicates the property to the deity, and in the second she as the founder of the trust lays down the rule of succession to the sebaitship. I do not find it possible to read the second part as a will executed by a sebait relating to the sebaitship.

[13] It has been urged that the Additional District Judge erred in disposing of the case on a preliminary issue. The general principle is that a case should not be tried piecemeal, but this is subject to the mandatory provisions of O. 14, R. 2, Civil P. C.: *vide* 17 P.L.T. 253.[9] In this connexion it is contended that for the decision of the preliminary point it was necessary to consider extrinsic evidence to show what was the intention of Jagat Tara Debi, and that the production of such evidence was prevented by the procedure adopted by the Judge. The question of extrinsic evidence to prove intention only arises if there is any ambiguity in the document which is under construction. Here the only portion of the document about which there can be any ambiguity is the expression "arpan karilam" in the first portion of it. During the argument it was suggested at one stage that these words might mean "I have created" and might refer to a dedication previously made that very day, either orally or by another document, so that the present document relates entirely to the sebaiti interest. The only other possible interpretation is that put on the words by my learned brother, that they mean "I dedicate" i. e. by the present document, an interpretation with which I agree. It is clear from the appellant's petition for probate, however, that he treated the property as still belonging to Jagat Tara Debi at the time of her death, a position which he again takes up in paras. 4 and 5 of the memorandum of appeal in this Court, in which he says that the document is clear that "the dedication was to come into effect on the death of the testatrix" and mentions that he has filed a a large number of documents

"to show that Jagat Tara Debi was dealing with the property as secular property from after the execution of the document till her death."

His case, therefore, was that the dedication was made by the document now in question, and that that dedication became operative on the death of the lady. In these circumstances it cannot be urged that the appellant has been prejudiced by not being given an opportunity to adduce evidence.

S. C. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 345** *[C. N. 121.]*

MANOHAR LALL AND RAMASWAMI JJ.

*The Governor-General in Council—Appellant* v. *Kabir Ram and others—Respondents.*

A. F. O. D. No. 92 of 1945, Decided on 9-1-1948, from decision of Sub-Judge, Hazaribagh, D/- 21-12-1944.

(a) Railways Act (1890), S. 72 — Negligence of Railway Company —Consignment looted by rioters —Looting not direct sequence of alleged negligence of Railway Company — Railway Company is not liable.

If a consignment sent to the consignee is looted by rioters and is thus lost to the consignee but the looting is not the direct sequence of the alleged negligence on the part of the Railway Administration, the Railway Company is not liable to the consignee for the loss of consignment. [Paras 7, 10]

(b) Railways Act (1890), S. 72— Non-delivery of goods entrusted to Railway Company—Burden to disprove negligence is on Railway Company.

Under S. 72, Railways Act, the responsibility of railway administration is that of bailee under Ss. 151 and 152, Contract Act. Under Ss. 151 and 152 the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee. Hence in case of non-delivery of goods entrusted to a Railway Company, burden to disprove negligence lies on Railway Company : 5 A. I. R. 1918 Cal. 892 and 26 Cal. 398 (P. C.), *Rel. on.* [Para 13]

(c) Contract Act (1872), S. 20—Contract of sale—Before sale and without knowledge of vendor goods stolen—Contract is void—Sale of Goods Act (1930), S. 7.

Where a consignee has entered into a contract of sale of goods with a third person but before the sale and without the knowledge of the vendor the goods are stolen in transit, the contract of sale is void on account of bilateral mistake. [In this case it was, however, not established that consignment was looted as alleged and hence the plea of mistake was not allowed.]

[Paras 16 and 25]

(d) Indian Independence (Rights, Property and Liabilites), Order (1947), S. 12 (i)— Substitution of Dominion of India for Governor-General in Council —Dominion of India is not deemed to be represented by same Advocate.

Section 12(i), Indian Independence (Rights, Property and Liabilities), Order 1947 enacts that where the Governor General in Council is a party to any legal proceedings on the appointed date, the Dominion of India "shall be deemed" to be substituted for the Governor-General in Council as a party to these proceedings and the proceedings may continue accordingly. But the substitution of the Dominion of India does not mean that the Dominion of India shall also be deemed to be represented by the same Advocate who appeared for the Governor-General in Council. Hence filing of a fresh vakalatnama is necessary. [Paras 22 and 27]

*Cases referred:*—

1. (1921) 3 K. B. 560 : 90 L. J. K. B. 1353, Polemis v. Furness Withy & Co.
2. (1933) 1933 A. C. 449 : 102 L. J. P. 73 : 149 L. T. 49, "Liesbasche" v. Edison.
3. (1920) 1920 A. C. 956 : 89 L. J. K. B. 705 : 123 L. T. 593, Weldblundell v. Stephens.
4. ('17) 25 C. L. J. 37 : 5 A. I. R. 1918 Cal. 892 : 43 I. C. 263, Surendra Lal v. Secy. of State.
5. ('99) 22 Mad. 524, Trustees of the Madras Harbour v. Best & Co.
6. ('94) 17 Mad, 445, Sesham Patter v. Mass.
7. ('99) 26 I. A. 1 : 26 Cal. 398 (P. C.), River Steam Navigation Co. v. Choutmull.
8. (1856) 5 H. L. C. 673 : 25 L. J. Ex. 253, Cauturier v. Hastie.
9. (1929) 1 K. B. 574 : 98 L. J. K. B. 193 : 140 L. T. 670, Barrow, Lane and Balard v. Phillips.

*S. N. Bose and N. C. Ghosh*— for Appellant.

*B. C. De, G. C. Mukharji, L. K. Chaudhuri and B. C. Ghosh*—for Respondents.

**Ramaswami J.**—In the suit which is subject of this appeal the plaintiff sued the defendants for damages for breach of contract. Plaintiff alleged that on 5-8-1942 Rameshar Lal Raut Mal had booked 337 bags of rice from Kishanganj to Giridih. Defendants 2 to 6 purchased these bags of rice which were covered by the railway receipt Ex. 5. On 30-8-1942 defendants 2 to 6 sold the goods in their turn to plaintiff for payment of Rs. 5,897 in cash. It was agreed that the plaintiff would pay railway freight and take delivery of consignment. It was a term of the contract that if the goods were not actually delivered to the plaintiff, the defendants 2nd party would refund the money paid and compensate the plaintiff. The plaintiff next alleged that the Railway Administration (defendant 1) did not make delivery of the bags of rice. On enquiry the railway administration informed the plaintiffs that the goods had been looted from two stationery wagons at Kiul Railway Junction by a mob of rioters on 14-8-1942. The plaintiff alleged that the loss was due to the negligence of railway administration who as bailee was responsible for displaying proper amount of care. In case defendant 1 was held not liable, the plaintiff asked for an alternative decree against the defendant 2nd party who were liable to recoup the loss according to the stipulation of the contract.

[2] The railway administration resisted the claim on the ground that there was no negligence on their part and the loss or destruction of the consignment was due to an extraordinary event which could not be prevented or foreseen. The defendants 2nd party denied that there was any oral stipulation that they would refund the money to plaintiff in case the goods were not delivered to the latter. They alleged that the loss of consignment was due to the negligence of the railway company who alone was liable.

[3] The trial Judge found that the loss of consignment was due to the negligence of the railway administration. He also held that there was a special term of the contract that defendants 2nd party would refund the money in case the goods were not received by the plaintiff. But in accordance with the first finding the trial Judge granted a decree only against the railway administration for Rs. 5897 odd.

[4] Against this decree defendant 1 has instituted this appeal.

[5] Two arguments were presented before us on behalf of the appellant.

[6] In the first place, it was urged that the looting of the consignment could not be directly attributed to any negligence on the railway's part and the administration was not liable for non-delivery of the goods. The second contention was that plaintiff's contract of sale with defendants 2 to 6 on 30th August 1942 was void on account of mutual mistake for the reason that the consignment was non-existent on that date having been destroyed or looted by rioters on 14th August 1942. That being so, it was urged that the plaintiff had no right or cause of action against the railway administration.

[7] On the first question, learned advocate invited us to hold that the administration made no negligent delay in transhipment of the con-

signment; that even if the delay was negligent, the looting of the goods on the alleged date was not direct consequence of this negligent conduct. In other words, the argument was that the consequence was too remote, and that the railway was not liable for the loot of the consignment. It is the admitted case that the three metregauge wagons in which the consignment was loaded [arrived at ?] Manihari Ghat on 7th August 1942. D. W. 2 admits that the wagons were despatched from Katihar to Manihari on 6th August at 17-5 hours. According to D. W. 3 a goods train usually takes one hour to run from Katihar to Manihari. D. W. 4 concedes that he took charge of the wagons on 9th August 1942. The wagons were unloaded and the rice bags were conveyed to a flat and towed across the Ganges. At Sakrigali Ghat the bags were transhipped to two broad guage wagons. D. W. 5 stated that he received the consignment at the Sakrigali Ghat from flat No. A (2) on 10th August 1942. (Ex. F-1 entry in Tally Book dated 11th August 1942). The learned Subordinate Judge held that delay in taking charge of the wagons at Manihari Ghat and the further delay of two days at Sakrigali was due to the gross negligence of the railway servants. But the evidence does not conclusively support this inference. There is no evidence to indicate what was the volume of traffic at Sakrigali and Manihari and whether the delay was excusable. But assuming that the delay was negligent, it does not necessarily follow that the plaintiff must succeed. For the plaintiff will lose his action if the harm which he has suffered is too remote a sequence of the defendant's conduct.

[8] In the leading case in (1921) 3 K. B. 560[1] the Court of Appeal adopted the view that if a reasonable man would have foreseen any damage as likely to result from his act then he was liable for all direct consequence of it whether a reasonable man could have foreseen them or not. In that case Scrutton L. J. defined what was "direct" consequence. He said that damage was indirect if it was "due to the operation of independent causes having no connection with negligent act except that they could not avoid its results." In 1933 the House of Lords considered the case in (1921) 3 K.B. 560[1] and they put an interpretation upon it which limited its scope. The case before them was 1933 A. C. 449.[2] Lord Writ distinguished (1921) 3 K.B. 560[1] on the ground that the injuries suffered were "immediate physical consequences of a negligent Act." He held that plaintiff could only recover as damages the market price of a dredger comparable to Licsbosche[2] and the date on which the substituted dredger could reasonably have been available for work. But the claim of extra expenses due to poverty was rejected, because the plaintiff's want of means was an extraneous matter which rendered this special loss too remote. In this context, I would refer to another important case. In 1920 A. C. 956[3] Lord Sumner emphasised that in general (apart from special contracts and relations and the maxim *respondeat superior*). even though A was in fault, he was not responsible for injury to C which B, a stranger to him, deliberately chose to do. Though A might have given the occasion for B's mischievous activity, B then became a new and independent cause." In this case the House of Lords held that if A wrote a libel on C which was published by B over whom A had no control, A was not liable to C. Until publication, no tort at all was committed, and when publication did take place it was due to B and not to A. As Lord Sumner observed in his speech the object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done. The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomena, or of an historical investigation of the chapter of events.

[9] In this context it is relevant to cite Bacon's rendering of the maxim "*in jure non remota causa sed proxima spectatur.*" "It were infinite for the law to consider the cause of causes and their impulsions one of another; and therefore it contenteth itself with the immediate cause and judgeth of acts by that without looking to any further degree."

[10] In the present case it is patent that the alleged looting of the consignment at Kiul is too remote a sequence of the alleged negligent conduct on the part of the railway administration.

[11] But in my opinion the plaintiff is entitled to get a decree against the administration on the ground that there is no sufficient evidence to establish that the consignment was actually looted by the mob of rioters on 14th August.

[12] It is the admitted case that on 11-8-1942 the two railway wagons were despatched from Sakarigali Ghat to Sahebganj. D. W. 8 (number taker) stated the two wagons were received at Jamalpur on 12th August 1942 and 13th August 1942 (*vide* entries H-1 and H-1/1). D. W. 9, the Kiul Station Clerk, deposed that the wagons were received at Kiul on 13th August 1942 at 5-30 P. M. It is alleged that on 14th August 1942 a mob of 5000 persons made a raid on the railway station, destroyed the records and furniture, broke open the seals of the goods wagons and looted the contents. D. W. 11, Station Master Mr. K. B. Chatterjee, has given important evidence. He deposed that on 15th August at 4 P. M. he took stock of all the wagons in the yard and the condition thereof. In his presence Mr. M. K.

Banerji, Head Checking Clerk, wrote a report, Ex. J-1. On the next date, 16th August, Mr. Banerji again prepared a detailed list of the contents of wagons which were not completely empty, Ex. K-1. For the respondent it is rightly pointed out that Mr. M. K. Banerji, the Head Checking Clerk, has not been examined in Court. The Station Master has deposed that Mr. Banerji wrote the reports, Ex. J-1 and Ex. K-1, in his presence. But Ex. J-1 does not itself bear any endorsement of the Station Master to the effect that he has verified the contents. It is also remarkable that Ex. J-1 does not indicate on what date it was prepared. It bears the alleged signature of Mr. Banerji but there is no date beneath. The same criticism may be made of the other document, Ex. K-1. It is hence not possible to rely on the oral evidence of the Station Master that he verified the stock of all the wagons. It is important to notice that on 16th August the Station Master prepared a report, Ex. I-1 but despatched it to Divisional Superintendent on 1st September. Even in this belated report there is no mention that the Station Master took stock of the wagons or prepared a detailed list of the contents. For the railway company no reason has been assigned why the alleged writer of Ex. J-1, namely, Mr. Banerji, has not been examined. It is patent that the defendants' evidence does not satisfactorily establish that the specific consignment in dispute in the present case was looted by the mob of rioters from Kiul Station on 14th August.

[13] On this finding of fact, the question arises, what is the necessary legal consequence. Under S. 72, Railways Act, the responsibility of railway administration is that of bailee under Ss. 151 and 152, Contract Act. Under Ss. 151 and 152 the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee. In 25 C. L. J. 37[4] the plaintiff had made over to railway 250 bundles of tobacco for delivery to Calcutta. In course of transmission the goods were destroyed by a severe cyclone while being carried on a flat in river Padma. Sir Asutosh Mookharjee observed that when goods were not delivered to the consignee at the place of destination, the plaintiff need not prove how the loss incurred. The burden lay upon the bailee to prove the existence of circumstances which exonerated him from liability for the loss. Sir Asutosh Mookharjee relied upon two cases 22 Mad. 524[5] and 17 Mad. 445.[6] In 26 I. A. 1[7] the Judicial Committee had previously adopted the same view. In that case jute property put on board one of the appellants' vessels took fire and was consumed. The respondents claimed damage for non-delivery of 432 drums of jute. It appeared that upon the night in question from some incomprehensible cause the jute caught fire and the whole cargo was burnt. The Judicial Committee held that under the Carriers Act the appellants would have been exempt from liability if they had proved (the onus being on them) that there was no negligence on their part, but that on the evidence they had failed to exonerate themselves.

[14] In the present case the defendant railway has not given reliable evidence to prove the existence of circumstances which exonerated it from liability for the loss. The non-delivery of the consignment is *prima facie* evidence of negligence. No proof has been offered by the railway company to rebut this presumption.

[15] I hold that the Subordinate Judge rightly passed decree against defendant 1 in the present case.

[16] For the appellant it was next argued that the contract by which the plaintiff acquired title to the consignment of rice was void on account of bilateral mistake. It was pointed out that on 14th August 1942 the consignment had been looted by the mob of rioters from the Kiul railway station. If that be so, the consignment was not existent on 30th August 1942 on which defendants 2 to 6 purported to sell it to the plaintiff. In this connection reference may be made to S. 7, Indian Sale of Goods Act. This section corresponds to S. 6 of the English Act and is declaratory of the Common Law. In (1856) 5 H. L. C. 673[8] there was sale of a cargo of corn which had been shipped at Salonica for delivery in London. Unknown to the seller the cargo had before the date of contract become heated and in consequence had been landed at Tunis, an intermediate port, and sold by the master of the ship. The House of Lords held that the contract contemplated that there was an existing something to be sold and bought and capable of transfer which not being the case, the contract was void for mistake. There are English authorities to the effect that the contract is void not only in cases where the goods have been destroyed but also in cases where the seller is irretrievably deprived of them as when they have been stolen or lawfully requisitioned by Government. In (1929) 1 K. B. 574[9] there was a sale of 700 bags of Chinese ground nuts identified by marks lying in a warehouse. Unknown to the seller before the sale 109 bags had been stolen or fraudulently abstracted. It was held that the sale was void and the buyer could not be compelled to take the remainder. Wright J. restated the well-established rule that

"where a contract related to specific goods which did not then exist, the case was not to be treated as one in which the seller warranted the existence of the specific

goods but as one in which there has been failure of consideration and mistake."

[17] The principle is well illustrated in Civil Law (Digest 18.4-9 *de contrahenda emption.*) After laying down the general rule, that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have misapprehended each other as to the corpus, as where an absent slave was sold and the buyer thought he was buying Pamphilu and the vendor thought he was selling stichus, and pronouncing the judgment that in such a case there was no bargain because there was "*error in corpore*" the framers of the digest moot the point thus :

"*Indeo quaeritor, si in ipso corpore non erretur, sed in substantia error sit, ut, puta, si acetum pro vino veneat aes pro auro, vel plumbum pro-argento vel quid allud argento simile an emptio at venditio sit*"

and the answers given by the great jurist quoted are to the effect, that if there be misapprehansion as to the substance of the thing there is no contract : but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding.

[18] This is also the opinion of the French Civilians. In contract de Vente Pohier says :

"There must be a thing sold, which forms the subject of the contract. If then ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant, that it has been wholly, or in great part, burnt down, the contract is null, because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it."

[19] In the present case, however, it is not established by satisfactory evidence that the consignment of rice was destroyed or has been stolen by the mob of rioters as alleged by the defendant. It follows that the plea of mistake cannot be accepted, and contract of sale is not void on that account. It cannot be disputed that plaintiff obtained title to the consignment and that he could properly institute the present suit.

[20] I hold that the trial Judge has correctly granted decree against defendant 1.

[21] I would affirm the decree of the lower Court and dismiss this appeal with costs.

[22] Before parting with this case I may advert to the argument of the respondent that there has been no substitution in place of Governor General in Council and the appeal was incompetent. But S. 12 (1), Indian Independence (Rights, Property and Liabilities) Order, 1947, enacts that where the Governor-General in Council is a party to any legal proceedings on the appointed date, the Dominion of India "shall be deemed" to be substituted for the Governor General in Council as a party to these proceedings and the proceedings may continue accordingly. In the present case, the substitution should be deemed to have been made; and it is merely necessary for the learned advocate, Mr. S. N. Bose, to file a fresh vakalatnama which he has undertaken to do.

[23] **Manohar Lall J.**—I agree, but wish to make a few observations. I was not at all impressed by the argument of Mr. De that it has not been established on the evidence that the bags of rice ever reached Kiul and that they are still in a railway wagon somewhere. The documentary evidence, as has been pointed out by my learned brother, completely establishes the arrival of the wagons in which the bags of rice were loaded at Kiul on 13-8 1942.

[24] Mr. S. N. Bose for the railway company seriously contended that the learned Judge was wrong in holding that the delay taken in the transit by the railway company was serious and contributed to the loss on 14th August. I agree with this contention. The only delay which has been found by the Subordinate Judge is between 6th August and 9th August. Any one who is familiar with the working of the railways of the metre-guage in this province and specially of those lines which reach the ghats where the goods have to be unloaded and loaded in the flats and steamers will readily agree that the delay of two or three days at Maniari Ghat before the goods reached Sakarigali Ghat cannot be held to be excessive. Indeed Mr. De was not very serious in supporting this part of the finding of the Subordinate Judge. But even if it is accepted that there was unreasonable delay in the unloading and the loading of the goods at the two ghats, it is impossible for me to understand how the Subordinate Judge could have arrived at the conclusion that this delay was a contributory cause of the loot on 14th August. There is no conceivable connection between the delay and the riot on 14th August. This argument which appealed to the Subordinate Judge is wholly far-fetched, and I have no hesitation in overruling it.

[25] It was also argued by Mr. Bose that the plaintiffs had no right to sue because on the date when the title in the goods was transferred to the plaintiffs the goods ceased to exist as they had been looted away. This argument would have been sound if I had come to the conclusion that the goods had been looted away. But the evidence in the case is wholly insufficient to arive at the conclusion that these particular goods were looted away on 14th and 15th August, and for the reasons about to be given.

[26] The onus is on the railway company to prove that these particular goods were looted.

They rely upon EX. J-I, which was a list of the wagons at Kiul station yard prepared by one M. K. Banerji, and EX. K-I which was a list of the articles found in the looted wagons, also prepared by Mr. Banerji. The whole case of the railway depended upon the proof of these two exhibits. But strange as it may appear, Mr. Banerji has not been examined in this case. It is, therefore, impossible to place any reliance on these two documents in the absence of evidence before the Court that Mr. Banerji had prepared these two lists on his own personal knowledge. The plaintiffs are certainly seriously prejudiced if these two documents are taken in evidence against them when they had no occasion whatsoever to cross-examine Mr. Banerji. But an attempt was made by oral evidence to prove that the station master, Mr. K. B. Chatterji, witness NO. 11 for the defendant, had verified the contents of these two documents. Mr. Chatterji says at the top of p. 30 that M. K. Banerji, head checking clerk, wrote the report EX. J-I and he verified it. He says a little later that EX. K-I is the list written by Mr. Banerji on 16th August that is to say a detailed list of the contents of the wagons, in the presence of the witness. Now the important circumstance against the acceptance of this evidence is that Mr. Chatterji in the report EX. I (1), which he sent to the Divisional Superintendent, Dinapore, (which may be assumed to have been written on 16th August but was despatched on 1st September) does not say a word that he verified the contents of any railway wagon or that he checked the railway wagons in the station yard on 15th or 16th August. All he says is that on the morning of 16th August each and every wagon was searched, list of contents made out and, the wagons riveted and sealed. It may be that Mr. Chatterji is merely deposing to the real fact that he relied on the report of Mr. Banerji, but I cannot accept his evidence if he intended to say that he himself verified the contents of the wagons by checking the wagons. There were about 125 to 130 wagons and he could not have checked all these wagons himself in the short time of one hour. I, therefore, agree with my learned brother that it has not been established that these particular goods were actually looted by the rioters. As to what happened to the goods thereafter it is impossible to say as the railway company has produced no other evidence beyond alleging that these particular goods were looted on 14th and 15th August.

[27] A preliminary objection was taken on behalf of the respondent that this appeal had become incompetent by reason of the fact that the defendant railways have now vested in the Dominion of India and no substitution has been made of the name of the appellant — the name of the appellant stands in the record of this appeal as Governor-General in Council. The answer to the argument is that by S. 12 (1) of the Indian Independence Order, 1947, it is clearly enacted that the Dominion of India shall be deemed to be substituted for the Governor-General in Council as a party to these proceedings and the proceedings will continue accordingly. It is, therefore, clear that the substitution of the Dominion of India must be deemed to have been made after the appointed date. But I agree with the contention of the respondents that the substitution of the Dominion of India does not mean that the Dominion of India shall also be deemed to be represented by the same advocate who appeared for the Governor-General in Council. To meet this difficulty, Mr. S. N. Bose has undertaken to file a fresh vakalatnama. He is allowed to file it before the decree is actually signed in this office.

D.S. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 350** *[C. N. 122.]*

MANOHAR LALL AND RAMASWAMI JJ.

*Sheoshankarprasad and another — Appellants* v. *Mahabir Prasad and another — Respondents.*

A. F. A. D. No. 539 of 1946, Decided on 27-8-1947, from decision of Addl. Dist. Judge, Gaya, D/- 8-12-1945.

**Civil P. C. (1908), S. 66—Scope and applicability —Purchase of property by *P* in name of *D*—*P* in possession since purchase — Sale by *P* to *R*—*D* executing sale deed and agreeing to hand over consideration money to *P* — Suit by *P* against *D* to recover money not paid— S. 66 held did not apply.**

Section 66 must be construed strictly as it encroaches upon the rights of the true owner remembering that benami transactions are only discouraged by the Legislature but are not being made illegal. [Para 12]

Where a true owner recovers possession or has always been in possession and he bases his relief in the suit (other than that of possession or confirmation of possession) upon a title obtained by the purchase, the provisions of S. 66 have no application. [Para 12]

The real owner if he is in possession can always resist a suit by the certificate auction purchaser. [Para 12]

The real owner is entitled to maintain a suit for specific performance of an agreement by the ostensible owner to transfer the property to him provided such an agreement is made after the auction purchase. [Para 12]

Where the true owner has dispossessed the certificate holder and is adversely in possession for over 12 years, he can maintain a suit for recovery of possession even against the certificate purchaser because his claim is now based upon a different title and it is immaterial for him to allege or prove that he was the real owner at the date of the auction sale. [Para 12]

One *D* purchased certain property in Court auction-sale as a benamidar of *P*. Ever since the delivery of possession *P* continued to be in possession and *D* was not in possession for a single day. *P* subsequently negotiated a sale of the property with *M* and a sale deed was executed by *D* in favour *M* as the sale certificate

was in *D*'s name. *D* agreed to hand over to *P* money paid by *M* to him as a sale consideration, as soon as it was paid. On *D*'s failure to pay the amount as agreed, *P* sued *D* to recover the same :

***Held***, that the suit was based upon an agreement subsequent to the auction sale and, therefore, S. 66 had no application to the case: *Case law reviewed.*

[Para 14]

**Annotation** :— ('44-Com) C. P. C., S. 66, N. 8, 10, 15, 21.

*Cases referred.*—

**1.** ('33) 12 Pat. 616 : 20 A. I. R. 1933 Pat. 264 : 149 I. C. 393, Keshri Mull v. Sukhan Ram.
**2.** ('29) 56 I. A. 330 : 16 A. I. R. 1929 P. C. 228 : 51 All. 675 : 120 I. C. 651 (P. C), Mahomed Abdul Jalil Khan v. Md. Obaid Ullah Khan.
**3.** ('96) 23 Cal. 699, Sasti Churn Nundi v. Annapurna.
**4.** ('16) 43 Cal. 20 : 3 A. I. R. 1916 Cal. 762 : 29 I. C. 787, Hanuman Prasad v. Jadu Nandan.
**5.** ('26) 53 Cal. 297 : 13 A. I. R. 1926 Cal. 542 : 92 I. C. 984, Umashashi Debi v. Akrurchandra.
**6.** ('01) 23 All. 175, Bishan Dial v. Ghaziuddin.
**7.** ('38) 25 A. I. R. 1938 Cal. 602 : 181 I. C. 102, Ali Ahmed v. Shamsunnissa.
**8.** ('19) 42 Mad. 615 : 6 A. I. R. 1919 Mad. 94 : 51 I. C. 111 (F. B.), Amrutam Venkatappa v. Vavila Jalayya.
**9.** ('20) 47 I. A. 108 : 7 A. I. R. 1920 P. C. 30 : 43 Mad. 643 : 56 I. C. 395 (P. C.), Ramathabi Vadivelu Mudaliar v. Peria Manicka Mudaliar.
**10.** ('37) 24 A. I. R. 1937 Mad. 362, Muniappa Mudali v. Thangavelu Mudali.
**11.** ('31) 18 A. I. R. 1931 Bom. 578 : 136 I. C. 509, Allibhai Mahomed v. Dada Alli Isap.
**12.** ('72) 14 M. I. A. 496 : 10 Beng. L. R. 159 (P. C.), Mt. Buhuns Koonwur v. Lalla Buhoree Lall.
**13.** ('75) 2 I. A. 154 : 3 Sar 472 : 3 Suther 122 (P.C.), Lokhee Narain Roy v. Kalypuddo.
**14.** ('15) 42 I. A. 177 : 2 A. I. R. 1915 P. C. 81 : 37 All. 545 : 30 I. C. 265 (P. C.), Ganga Sahai v. Keshri.
**15.** ('17) 44 I. A. 201 : 4 A. I. R. 1917 P. C. 12 : 40 All. 159 : 20 O. C. 211 : 40 I. C. 988 (P. C.), Suraj Narayan v. Ratanlal.
**16.** ('28) 15 A. I. R. 1928 P. C. 75 : 24 N. L. R. 59 : 108 I. C. 11 (P. C.), Balaram v. Naktu.
**17.** ('27) 54 I. A. 338 : 14 A. I. R. 1927 P. C. 176 : 51 Bom. 725 : 104 I. C. 257 (P. C.), Bhagchand Dagadusa v. Secy. of State.
**18.** ('10) 6 I. C. 404 (All.), Raghunandan Lal v. Matru Mal.

*Janak Kishore* — for Appellants.
*D. N. Varma* — for Respondents.

**Manohar Lall J.** — In this appeal by the plaintiff the only question for determination is whether the Additional District Judge of Gaya was right in holding that the suit of the plaintiff was barred under the provisions of S. 66, Civil P. C., in the following circumstances.

[2] The property in dispute is 3 annas and 12 dams odd share in Mahal Rupau, tauzi No. 4382. In execution of a certificate for realisation of cess against the proprietors, the property was purchased on 20-4-1931 by Mahabir Prasad alias Bakhori Lal, defendant 1. The Courts below have concurrently found that Mahabir Prasad was the benamidar but the real purchaser was Bipat Ram, the father of the plaintiffs and the pro forma defendant—he died in 1933. They have also found that ever since the delivery of possession, Bipat Ram and thereafter his sons continued in possession, i. e., the benamidar was not in possession for a single day and all the rent suits for the recovery of bak hazri from the usufructuary mortgagee, who was in possession of the property, were instituted by the plaintiffs and the pro forma defendant though in the name of the benamidar; they made all the pairvis and realised all the decrees after putting them into execution.

[3] It has also been found, as is the plaintiff's case, that the plaintiffs and the pro forma defendant negotiated with Mahant Ramdhan Puri of Budhauli for the sale of the property together with the arrears of the bak hazris due from the usufructuary mortgagee, Munshi Deonath Sahay for 1947 Fasli, and the consideration was settled at Rs. 4383-12 0 and a sale deed was executed on 30-9-1940. The sale deed was signed by defendant 1, Mahabir Prasad, as the executant, as the sale certificate stood in his name, but the plaintiffs and the pro forma defendant also attested as marginal witnesses.

[4] The plaintiff's case is that after the money was paid before the Registrar into the hands of defendant 1 who had agreed to hand the money over to the plaintiffs and the pro forma defendant a dispute arose between the plaintiffs and the pro forma defendant as to the exact amount of the shares of each of the vendors. Therefore the money remained with defendant 1 who later on disappeared and would not make over the sum to the plaintiffs and the pro forma defendant. Hence the plaintiffs instituted the suit on 19-5-1942 for recovery of the money, namely the consideration for the sale deed of the property. The trial Court in a careful and well-reasoned judgment disbelieved the defendant's case that he was the true owner in possession of the property and also repelled his alternative argument based upon S. 66, Civil P. C. Accordingly, he decreed the plaintiff's suit.

[5] Against this decision there was an appeal which was disposed of by the learned Addtional District Judge of Gaya who in an equally careful and well considered judgment while agreeing with the findings of fact of the trial Court, as I have already stated, came to the conclusion that the plaintiff's suit was hit by the provisions of S. 66, Civil P. C., allowed the appeal and dismissed the suit. Hence the second appeal to this Court.

[6] The cases which are usually cited on such occasions were placed before us including a Division Bench decision of this Court reported in 12 Pat. 616[1] and some cases from the other High Courts. I propose to review those cases in the first instance and then to apply the principles deducible therefrom to the facts of the present case.

[7] *Patna* — In 12 Pat. 616[1] Khwaja Mohammad Noor J., made these observations at p. 624:

"The general result of the case law on S. 66, Civil P. C. and on the corresponding section of the old Codes is that the suit of a plaintiff, who bases it on the ground that he was the real purchaser at a court sale and that the certified purchaser was not really so, must fail. But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis, the real owner can successfully defend it on the ground of his being the real purchaser . . . if the plaintiff does not base his suit upon the title which, in my opinion, he undoubtedly has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of S. 66, Civil P. C. If, for instance, the plaintiff continues in possession for more than 12 years, this possession by itself gives him a title independent of the title which he had on account of his being the real purchaser at the court sale, and if he is subsequently dispossessed his suit based upon this possessory title will, as was pointed out in 56 I. A. 330[2] succeed."

In the same case Scroope J. held that the case in 23 Cal. 699[3] must be regarded as obsolete and no longer good law as it has not been followed in two later Calcutta cases, e. g. 43 Cal. 20[4] and 53 Cal. 297[5] and 23 ALL. 175.[6]

[8] *Calcutta*—The Calcutta cases which have been cited before us have all been reviewed in 12 Pat. 616[1] with the exception of A. I. R. 1938 Cal. 602[7] which is on the line with the earlier Calcutta cases and expressly dissents from 23 Cal. 699[3] and follows 12 Pat. 616.[1]

[9] *Madras*—The Full Bench judgment in 42 Mad. 615[8] was affirmed by their Lordships of the Judicial Committee in 47 I. A. 108.[9] The short judgment of Wallis C. J. may be quoted here:

"We do not think that this is a suit against the auction purchaser on the ground that the purchase was made on behalf of the plaintiff within the meaning of S. 66, Civil P. C. The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one-half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This in our opinion is not a benami transaction at all. The mere fact that the plaintiff alleges in the plaint that the auction-purchaser was the benamidar for him has not in our opinion the effect of debarring the plaintiff under S. 66, Civil P. C., from maintaining his suit for specific performance of an agreement by the auction purchaser subsequent to the purchase to convey the property to the plaintiff. Such an agreement is not inconsistent with auction purchaser's own title, but rather the reverse."

In A. I. R. 1937 Mad. 362,[10] Venkataramana Rao J. observed regarding the ambit of S. 66, at p. 363:

"The section has to be stricty applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract, or title acquired subsequent thereto, S. 66 is not a bar."

and pointed out that in the case before him the case of the plaintiff was not rested on the fact of the benami purchase or a mere prior agreement by the defendant to convey but on a conveyance subsequent to the court sale and the relief sought for was the rectification of that conveyance. The learned Judge emphasised towards the end of his judgment that the cause of action was the title under the conveyance, an event which happened subsequert to the court sale and the fact that the basis of the contract embodied in the sale deed was the prior benami purchase did not affect the title obtained under the conveyance.

[10] *Bombay*—The Bombay view is well expressed by A. I. R. 1931 Bom. 578[11] and is to the same effect, namely that S. 66 must be strictly construed and it will apply only to a suit in which the cause of action is given by the benami purchase and not to a suit which is based on a contract which is separate from the transfer.

[11] *Allahabad*—The case in 23 ALL. 175[6] is the leading case and has already been referred to.

[12] *Privy Council cases.* — The leading decision is the case in 14 M. I. A. 496[12] in which it was held that the effect of the corresponding section of the Code of 1859 was not to make these benami transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section. The case in 2 I. A. 154[13] expressly followed 14 M. I. A. 496[12] and it was further observed by Sir Montague E. Smith that the real owner for whom the purchase was made if in possession, and if that possession had been honestly obtained, might defend notwithstanding this corresponding S. 260 a suit brought by the holder of the certificate to show that he was the true owner and the apparent owner only a mere trustee. In 42 I. A. 177[14] their Lordships held that the provisions of S. 317, the corresponding section of the Code of 1882, were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of the judgment-debtors, and in no way affect the title of the persons otherwise beneficially interested in the purchase—in this case it was held that the co-decree-holders of Ganga Sahai in whose name the sale certificate was granted by the Court were not precluded by the section from showing that the purchase was on behalf of them also, and the heirs and representatives of Bahadur Singh were held entitled to recover from Ganga Sahai one-third share of the properties which were purchased by him in execution of a joint mortgage decree. In 44 I. A. 201[15] the joint family was held barred by the provisions of S. 317, Civil P. C., 1882, to lay claim to the properties of which the son-in-law of the karta was the certificate auction purchaser,

47 I. A. 108[9] is the first case under the present Code. This was a suit for specific performance of an agreement entered into before the auction sale and also after the auction sale by the certificate purchaser to convey the property to the real owner. It was argued that S. 66 was a bar, but their Lordships overruled the contention in these words at p. 115 :

"If the agreement entered into before the auction stood alone, there would be considerable force in this contention. The object of S. 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale. It was decided in 42 Mad. 615[8] that an agreement subsequent to a purchase is not affected by the section, and there can be no question as to the correction of that decision. In the present case, agreements were entered into after the sale . . . . . by which the appellant bound himself to carry out the original contract with the respondents with certain variations which were then agreed to and accepted by all parties. These subsequent agreements are unaffected by the section and are accordingly enforceable against the appellant."

A. I. R. 1928 P. C. 75.[16] In this case the property, a village, was purchased by Naktu. The allegation in the plaint was that Naktu had purchased the village in his own name and contrary to the directions given to him by Bhikha, but no evidence was adduced with regard to this but on the contrary in the Courts below the basis of Bhikha's case was that Naktu's name was entered in the sale certificate with his consent. Their Lordships observed :

"This is tantamount to the purchase being benami, and both Courts held that Bhikha was precluded by S. 66, Civil P. C. from claiming the property on the ground that Naktu was not the real purchaser."

The sale was held on 28th October 1907 and confirmed on 5th December 1907 in favour of Naktu who after obtaining the sale certificate got possession on 5th June 1908. It was urged by Bhikha that there was an agreement dated 4th November 1907 by which Naktu promised to convey the property whenever asked to do so by Bhikha. It was on these allegations that Bhikha instituted a suit for recovery of possession from Naktu and his sons. Although the trial Court took the view that the letter evidencing the agreement was genuine, but the appellate Court held that the letter was unreliable and their Lordships accepted that finding of fact and pointed out that the suit had been brought one day less than the expiry of 12 years from the date of the auction sale in favour of Naktu. This case was decided mostly on fact. The case in 56 I. A. 330[2] contains a full discussion of the ambit of S. 66 of the present Code of Civil Procedure. After referring to the case in 14 M. I. A. 496[12] and 2 I. A. 154,[13] their Lordships observed at p. 337 :

"Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser, 'being the true owner' to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing 'on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims' within the meaning of the section. In such a case, if the true owner has been in possession, for less than twelve years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question, as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so acquired under the Limitation Act."

and their Lordships pointed out that a suit based on such a dispossession after over twelve years cannot become a suit on the ground, that the purchase was made on behalf of the plaintiff merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, benami.

[12a] The following principles can be extracted from this review of authorities: (1) Section 66 must be construed strictly as it encroaches upon the rights of the true owner remembering that benami transactions are only being discouraged by the legislature but are not being made illegal. (2) Where a true owner recovers possession or has always been in possession and he bases his relief in the suit (other than that of possession or confirmation of possession) upon a title obtained by the purchase, the provisions of S. 66 have no application. (3) The real owner, if he is in possession, can always resist a suit by the certificate auction purchaser as a plaintiff. (4) The real owner is entitled to maintain a suit for specific performance of an agreement by the ostensible owner to transfer the property to him provided such an agreement is made after the auction purchase. (5) Where the true owner has dispossessed the certificate holder and is adversely in possession for over 12 years, he can maintain a suit for recovery of possession even against the certificate purchaser because his claim is now based upon a different title and it is immaterial for him to allege or prove that he was the real owner at the date of the auction sale.

[13] Now, what are the facts in the present case? (1) This is not a suit by the true owner for

recovery of possession of the property. (2) The certificate-holder was never in possession of the property and did not receive the hak hazri for a single day from the usufructuary mortgagee. (3) The present suit is not based upon the title of the original certificate sale but is based upon the contract to sell between the plaintiffs and the pro forma defendant and the Mahant of Badhauli on the findings that the negotiation for the sale of the property was made by the plaintiffs and the pro forma defendant and that the consideration was paid into the hands of defendant 1 before the Registrar with a clear stipulation or agreement that the money would be immediately handed over to the plaintiffs and the pro forma defendant.

[14] It is, therefore, clear to me on the facts of the present case that the suit is based upon an agreement subsequent to the auction sale and, therefore, S. 66 can have no application to such a case. Mr. D. N. Varma vehemently argued that the present suit is in effect a suit for recovery of possession of the very property which has now been converted into cash by reason of the private sale. The argument may appear to be plausible, but when the facts are clearly remembered, the argument must be held to be of no substance. Here, as I have already observed, the plaintiff is not seeking to recover possession of the property because the property was always in his possession. He is merely suing to recover the proceeds of the sale which he himself made with the Mahant of Badhauli. In the present case I would hold that defendant 1 was a trustee for the money which was paid by the Mahant in the presence of the Registrar, defendant 1 having agreed to pay the sum to the plaintiffs and the pro forma defendant, but later on committed fraud by running away with the money. The matter would have been entirely different if it had been found that the defendant himself was in possession of the property, that he himself negotiated for the sale and received the consideration from the Mahant of Badhauli and then the plaintiffs made a claim for the payment to them of the consideration. Mr. D. N. Varma relied strongly on the Calcutta cases which I have already referred to above and specially to the observations in the Calcutta case in A. I. R. 1938 Cal. 602[7] (supra) where reliance was placed upon the case in 54 I. A. 338.[17] But that was a case under S. 80, Civil P. C., and their Lordships held that the section applies to suits which may be instituted against the Secretary of State, whether the suits are for declaration of possession or whether the suits are for injunction also. That decision is of no material help in the present case because we have to see the ambit of S. 66 and the nature of the suit.

[15] Mr. D. N. Varma also relied upon the case of the Allahabad High Court of the year 1910 in 6 I. C. 404.[18] In that case the plaintiffs claimed specific performance of a contract of a sale of land and in the alternative to recover a sum of Rs. 2600 together with interest alleging that the defendant had borrowed Rs. 2600 from the plaintiffs and purchased the lands agreeing at the same time that he would re-sell the property to the plaintiffs. The facts found, however, were that the plaintiff-decree-holder was refused leave to bid at the auction sale and then he adopted the device to evade the provisions of the law and as the defendant was then in his confidence, he purchased the property with his own funds but in the name of the defendant expecting that he would execute a formal transfer in his favour. Before, however, this could be done, the parties had a quarrel, and the defendant being the certified purchaser set up his own title to the property. The learned Judges held that the suit for return of the money was based upon the allegation that there was a contract of loan between the plaintiffs and the defendant, but on the finding there was no loan at all and observed:

"On the facts as found all that they (the plaintiffs) can ask the Court to hold is that in the events which have happened the defendant must be considered to hold the purchase money in trust for them. We think there are two reasons why the plaintiffs ought not to be allowed to recover back this money. In the first place we must alter the nature of the suit to meet the facts and we do not think that where the plaintiffs have been guilty of conduct like the present the Court was called upon to alter the nature of the suit. It seems also to us that even if we were to treat the suit as a suit for money received by the defendant for the plaintiffs, the plaintiffs could not succeed except by showing that the defendant made the purchase on their behalf. Such a suit it seems to us is expressly prohibited by S. 317 of Act 14 [XIV] of 1882. It would be a suit against the certificate purchaser on the ground that the purchase was made on behalf of another person."

This case has no application to the facts of the present case where the suit, as I have endeavoured to show above, is not based upon the purchase, but is based upon a different cause of action.

[16] In these circumstances, I am of opinion that the learned Additional District Judge was in error in reversing the decision of the Subordinate Judge. I would allow the appeal, set aside the decision of the learned Additional District Judge and restore the decision of the learned Subordinate Judge. But in the circumstances of the case I would maintain his order that each party will bear his own costs in the Courts below. There will be no order for costs in this Court also to mark our sense of disapprobation of the benami purchase which has led to this litigation. The cross appeal is dismissed.

**Ramaswami J.** — I agree.

S. C. *Appeal allowed.*

**A. I. R. (35) 1948 Patna 355** *[C. N. 123.]*

IMAM AND DAS JJ.

*Shyam Lal* — *Petitioner* v. *The King.*

**Criminal Revn. No. 868 of 1947, Decided on 5-1-1948, from order of Sessions Judge, Dumka, D/- 26-7-1947.**

**(a) Government of India Act (1935), S. 92 (2)— Bihar Regulation, I of 1947 is not invalid.**

**The Santal Parganas Justice Regulation, 1893, comes within the expression "existing Indian Law" in S. 92 (2), Government of India Act, and the Regulation, 1 of 1947 made by the Governor under S. 92 (2), Government of India Act, amending that Regulation, is not in any way invalid.** [Para 4]

**(b) Bihar Cotton Cloth and Yarn Control Order (1945), Cl. 18 (2)—Person found in possession of 76 yards of cloth and 36 yards of saris — Person must be deemed to contravene Cl. 18 (2) unless he can prove otherwise.** [Para 5]

*Cases referred* :—

**1.** ('43) 24 P. L. T. 50 : 30 A. I. R. 1943 Pat. 18 : 22 Pat. 175 : 204 I. C. 451 : 44 Cr. L. J. 273 (F B), Banwari Gope v. Emperor.
**2.** (1905) 1905 A. C. 369 : 74 L. J. P. C. 77 : 92 L. T. 738, Colonial Sugar Refinery Co. Ltd. v. Irving.
**3.** ('47) 34 A. I. R. 1947 F. C. 32 : 26 Pat. 442, Chhatturam v. Commr. of Income-tax, Bihar.

*S. R. Ghosal*—for Petitioner.

*Government Advocate*—for the Crown.

**Imam J.**—The petitioner was convicted under R. 81 (4), Defence of India Rules for having contravened Cl. 18 (2), Bihar Cotton Cloth and Yarn Control Order, 1945, and sentenced to three months' rigorous imprisonment as well as to a fine of Rs. 300 in default to undergo rigorous imprisonment for a further period of three weeks.

[2] On the facts found, it appears that the petitioner had boarded a bus of the Sidique Motor Transport Service at Dumka on 16th July 1946 with two bundles, one tied with a blanket and the other tied with a *darri*. These two bundles were placed on the roof of the bus. One Babu Harendra Prasad Jha, Market Inspector, having suspected that a large quantity of cloth was being carried, searched the bus in the presence of several witnesses and recovered from the said two bundles the following articles of cloth: 11 pairs of saris, 9 pieces of saris, 2½ pairs of saris, 1 mark in *than* 33 yds in length; another mark in *than* also 38 yds. in length. The necessary sanction of the Provincial Government having been accorded, the petitioner was prosecuted and convicted as already stated.

[3] Mr. Ghosal has raised three points of law and wished to enter into the facts. On questions of fact, it was not possible to go behind the findings and we must proceed on those findings which establish that the petitioner was the one who placed those two bundles on the bus and that they had been in his possession. If an offence in law has been committed, then, on the facts the responsibility is that of the petitioner. As to the questions of law raised, Mr. Ghosal urged in the first instance that the Sessions Judge who heard the appeal had no jurisdiction to hear it as the proper forum for appeal was the District Magistrate. He urged that on the date the petitioner was placed on his trial, he had a vested right to appeal to the District Magistrate and the proper forum for appeal was not that of the Sessions Judge. For his argument he relied upon the observations of Sir Fazl Ali J. in 24 P. L. T. 50[1] and the Privy Council decision in 1905 A. C. 369.[2] It is to be remembered that on the date when the petitioner was convicted Regulation I of 1947 enacted by the Governor of Bihar was in force. By this Regulation, it was provided that a person convicted on a trial held by the District Magistrate, the Additional District Magistrate or any other Magistrate of the first class could appeal to the Court of Session. The petitioner filed his appeal in the Court of Session. There can be no doubt that the Sessions Judge had jurisdiction to entertain the appeal under the law as it existed then. Mr. Ghosal's argument that the petitioner had a vested right to appeal to the District Magistrate would not in any way remove the obstacle in his way, namely, that his client had himself chosen to appeal to a Court in whom jurisdiction was vested to hear the appeal. If Mr. Ghosal's client had in fact filed his appeal before the District Magistrate and objection had been taken by the Crown that that officer could not hear the appeal, it may well be that the argument of Mr. Ghosal might have prevailed having regard to the observations of Lord Macnaghten in the Privy Council case referred to. It seems to me that neither the observations of Sir Fazl Ali in 24 P. L. T. 50,[1] nor the observations of Lord Macnaghten establish that in the circumstances of this case the Sessions Judge had no jurisdiction to hear the appeal.

[4] The next point of law urged by Mr. Ghosal was that under S. 92, Government of India Act, 1935, the Governor could only proceed under S. 92 (1) and apply the provisions of the Code of Criminal Procedure by a notification and could not proceed under S. 92 (2) to make a Regulation. He relied upon certain observations of the Federal Court in A. I. R. 1947 F. C. 32,[3] but it seems to me that the observations of the Federal Court on which he placed reliance do not support him at all. Section 92 (1) was being referred to by the Federal Court and not S. 92 (2). Section 92 (1) empowers the Governor to apply to an excluded area the provisions of an Act of the Federal Legislature or of the Provincial Legislature subject to such exception or

modifications as he thought fit. This could be done by means of a notification. Their Lordships of the Federal Court were merely holding that this power of the Governor was legislative in nature and not executive as had been contended before them. Their Lordships did not deal with sub-s. (2) in anyway. Sub-section (2) of s. 92 empowers the Governor to make Regulations and by such Regulations to repeal or amend any Act of the Federal Legislature or of the Provincial Legislature or any existing Indian law which was for the time being applicable to the area in question. The interpretation to the expression "existing Indian law" is to be found in S. 311, Government of India Act and there can be no doubt that the Santal Parganas Justice Regulation, 1893 comes within that expression and it was this Regulation which had been amended by Regulation I of 1947 made by the Governor of Bihar. I can, therefore, see no reason to suppose that Regulation I of 1947 was in any way invalid.

[5] The third point raised by Mr. Ghosal was that under Cl. 18 (2) of the Bihar Cotton Cloth and Yarn Control Order, 1945, the onus lay upon the prosecution to prove that the amount of cloth found in the possession of the petitioner was in excess of his normal requirements. It is true that nowhere has it been defined in the said Order as to what is the normal requirement of a person; but I think that in matters of this kind one has to exercise one's commonsense. A person found with 76 yards of mark-in cloth and 36 pieces of saris must be deemed to be in possession of cloth in excess of his normal requirements unless he can prove otherwise. It is true that in a criminal prosecution the onus is always on the prosecution to prove its case, but as the clause stands, I read it to mean that a person found in possession of a large quantity of cloth or yarn which could not *prima facie* be regarded as his normal requirement, would have to show that in fact it was his normal requirement. The petitioner did not lead any evidence to prove that these saris and the mark-in *thans* were not only needed for himself but for members of his family. In the circumstances I think it must be regarded that for one single person to be in possession at a particular time of so much cloth must be regarded as being in possession of cloth in excess of his normal requirements.

[6] The points of law raised by Mr. Ghosal therefore fail and on the facts as I have already stated there can be no doubt that the petitioner was in possession of the cloth in question and therefore had contravened the provisions of Cl. 18 (2) of the Bihar Cotton Cloth and Yarn Control Order, 1945.

[7] Lastly it was urged that the petitioner had served 16 days in jail and that that may be considered sufficient by way of imprisonment and instead of sending the prisoner back to jail there may be an increase in the fine. I cannot see my way to accede to this submission. Offences of this kind must be regarded as anti-social and treated with severity.

[8] The conviction and sentence is accordingly affirmed and the application is dismissed.

**Das J.**—I agree.

V.B.B. *Application dismissed.*

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## A. I. R. (35) 1948 Patna 356 *[C. N. 124.]*

MEREDITH J.

*Rameshwar Lal Marwari*—*Petitioner* v. *Emperor.*

Criminal Revn. No. 47 of 1948, Decided on 16-2-1948, from order of Addl. Sessions Judge, Purulia, D/-20-12-1947.

**Food Grains Control Order (1942)—Entry made in morning showing stock of 6 mds. of wheat and 2 mds. of atta—Food Inspector inspecting stock at 11 a. m. and finding 8 mds. of atta and no wheat—Defence that wheat was ground into atta since morning — No evidence to contradict—Accused held could not be convicted under R. 81(4), Defence of India Rules (1939), for violating terms of license.**

Under the Food Grains Control Order, the licensee is required in ordinary course of business to write up the books once daily. The shop-keeper is not expected to keep his books entered up to the minute. [Para 2]

Where the books showed a stock of 6 mds. of wheat and 2 mds. of atta but at 11 a. m. when the Marketing Inspector visited the shop he found 8 mds. of atta and no wheat and the defence was that since early morning when the register was entered up, the 6 mds. of wheat had been ground into atta and there was no evidence to contradict this:

*Held* that the accused could not be convicted under R. 81(4), Defence of India Rules, for violating the terms of the license under the Food Grains Control Order by not maintaining his books properly. [Para 2]

*S. N. Sahay*—for Petitioner.

*Nizamuddin Khan*—for the Crown.

**Order.**—The petitioner has been convicted under R. 81(4), Defence of India Rules, and has been sentenced to one month's rigorous imprisonment and a fine of Rs. 100. The sentence has been maintained by the appellate Court. The case against him was that he had violated the terms of his licence under the Food Grains Control Order by not maintaining his books properly as required by the said licence. What happened was that at 11 A. M. the Marketing Inspector visited his shop. The books showed a stock of 6 mds. wheat and 2 mds. *atta*, but instead of that what was found was 8 maunds *atta* and no wheat.

[2] The defence was that the accused sold *atta* and not wheat, and that since early morning, when the register was entered up, the 6 maunds of wheat had been ground into *atta*. There was absolutely no evidence in the case to contradict or rebut this defence. The Courts below have merely stated that they could not believe it possible to have 6 maunds ground in the time. But that view seems to be based on no materials. The shop-keeper is not expected to keep his books entered up to the minute. The ordinary course of business will be to write up the books once daily. In the circumstances it does not appear to me that any non-compliance with the terms of the licence was established. The Courts below have taken the view that the 6 maunds of wheat must have been removed somewhere for some ulterior purpose, but that also seems to be based on no materials, and takes no account of the fact that the exact amount of wheat, which had disappeared, had re-appeared as *atta*. The application is allowed, the rule is made absolute, the conviction and sentence are set aside and the petitioner is acquitted.

R.G.D. *Rule made absolute.*

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**A. I. R. (35) 1948 Patna 357** *[C. N. 125.]*

SINHA J.

*Tribeni Pd. Bhagat and others—Appellants* v. *Sohrai Uraon and others—Respondents.*

A. F. A. D. No. 1089 of 1944, Decided on 15-3-1946, from decision of Sub-Judge, Ranchi, D/-8-6-1944.

**Chota Nagpur Tenancy Act (6 of 1908), Ss. 118 (1) (b) and 43 — Land entered in record of rights as Manjhihas—It falls under S. 118 (1) (b) — Right of occupancy cannot be acquired.**

The term *zirat* is a general term including all kinds of proprietor's privileged lands whereas the term *Manjhihas* has a special reference with particular reference to S. 118 (1) (b). Where land has been entered in the records of rights as *Manjhihas* it falls under S. 118 (1) (b) and no right of occupancy or even of non-occupancy can accrue in it. [Para 2]

*L. K. Choudhury*—for Appellants.
*A. K. Chatterji*—for Respondents.

**Judgment.**—This is a plaintiffs' second appeal from the concurrent decisions of the Courts below dismissing their suit for possession on the basis that the disputed revisional survey plot No. 1312 with an area of 72 acres is their *Manjhihas* land. The plaintiffs are proprietors of the village where the land in dispute is situate, to the extent of 10 annas 8 pies share. Their case was that by virtue of a private partition amongst the co-sharer proprietors this plot was allotted to the plaintiffs' share. It is further alleged that this plot belonged to that category of the privileged lands of the proprietors in which no occupancy or non-occupancy rights can be acquired in any circumstances. The plaintiffs wanted to bring the land in their *khas* cultivation but the defendants did not give up possession, hence the suit. The defendants contested the suit on the ground that they had been in possession for more than twelve years as *raiyats* and had thus acquired permanent rights in the land which entitled them to retain possession. Both the Courts below have taken the view that the land belongs to the category of landlords' privileged lands but that the plaintiffs had failed to prove that the disputed land fell under the category of *Manjhihas* land as contemplated in S. 118 (1) (b), of the Chota Nagpur Tenancy Act. In that view of the matter they have agreed in dismissing the plaintiffs' suit, hence this second appeal.

[2] The learned counsel for the appellants has contended and, in my opinion, rightly, that the Courts below have misdirected themselves in holding that the disputed land did not appertain to the category of proprietor's privileged land as contemplated in S. 118 (1) (b), Chota Nagpur Tenancy Act. It is common ground that the defendants have been in possession of the land in dispute for many years much more than twelve years. It is also noteworthy that in the two successive records of rights prepared under the Chota Nagpur Tenancy Act the land has been described as Manjhihas but in possession of the defendants or their ancestors. In the Guide and Glossary to the Survey and Settlement Operations in the Chota Nagpur Division it has been stated at page 37 that the term Manjhihas means "landlords' privileged lands surveyed and demarcated under Chota Nagpur Tenures Act of 1863 (a mistake for 1869). They are at the absolute disposal of the landlord and no right of occupancy or even of non-occupancy can accrue in them in any circumstances" (1939 edition).

It will further be noticed that in none of these entries in the records of rights have the defendants or their ancestors been recorded as having occupancy or non-occupancy rights in the plot in question. If the land belonged to the category of proprietors' private lands as contemplated in S. 118 (1) (a), ordinarily the entry in the record of rights would have been not Manjhihas but zirat (or some such synonymous term) Dakhalkar or Ghair Dakhalkar. The Courts below have made a mistake of not referring to the Survey and Settlement Guide and Glossary referred to above which makes it clear that the entry Manjhihas in the two records of rights would not have been there if the land did not answer the description of proprietors' private land as contemplated in S. 118 (1) (b), Chota Nagpur Tenancy Act. I have no doubt, in my mind, that if the Courts below had made a reference to the Guide and Glossary referred to above, they would not have insisted upon the plaintiff pro-

ducing the record of 1869 in proof of the fact that the disputed land belonged to the category of Manjhihas referred to in clause (b) of S. 118. In this connection reference may also be made to the Survey and Settlement Glossary where the term zirat has been explained at page 45 as "Privileged land as defined in S. 118, Chota Nagpur Tenancy Act". It follows, therefore, that the term zirat is a general term including all kinds of proprietors' privileged lands; whereas the term Manjhihas has a special significance, with particular reference to S. 118 (1) (b), Chota Nagpur Tenancy Act. If as found by the Courts below the defendants were in possession of the disputed land for many more than twelve years and if it were a land of the description of mere zirat as distinguished from Manjhihas, the survey entry would have been to the effect that the defendants had acquired occupancy or non-occupancy rights therein. But no such entry is found in the cadastral or in the revisional survey record of rights. Hence, in my opinion, the entries on the record of rights are entirely in favour of the plaintiffs-appellants and as there is no finding by any of the Courts below to the effect that the correctness of the record of rights has been rebutted by any cogent evidence on behalf of the defendants, those entries must be given effect to, with the result that it must be held that the defendants have not acquired occupancy or non-occupancy rights therein. Section 43, Chota Nagpur Tenancy Act, clause (b), makes it clear that landlords' privileged lands referred to in clause (b) of S. 118 are absolutely privileged and occupancy or non-occupancy rights cannot be acquired therein in any circumstances. In that view of the matter the suit should have been decreed by the Courts below and the decision to the contrary is erroneous in law. The appeal is accordingly allowed and the suit decreed with costs throughout.

[3] Application for leave to appeal under the Letters Patent is made and allowed.

D.S. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 358** *[C. N. 126.]*

SINHA AND MUKHARJI JJ.

*Rajendra Narain Bhanj Deo—Decree-holder-Petitioner* v. *Sri Janak Kishori Devi and others—Judgment-debtors—Opposite Party.*

Civil Reven No. 451 of 1947, Decided on 13-8-1947, from order of Addl. Sub-Judge, Patna, D/-31-5-1947.

**Bihar Money Lenders (Regulation of Transactions) Act (7 [VII] of 1939). S. 13—Re-valuation of properties—Valuation made under S 13 is not final and can be changed on sufficient grounds — Valuation made by High Court in appeal—Lower Court refusing to make re-valuation without going into evidence regarding sufficiency of grounds fails to exercise jurisdiction vested in it by law—Civil P. C. (1908), S. 115 (b).**

**It is open to the Court to make a re valuation of the properties to be sold in execution of a decree for money for proper and sufficient reasons. The Court is not precluded from making a fresh valuation of the properties when after the first valuation the circumstances have changed the shape of things, radically affecting the value of the properties for the better or for the worse. There is nothing in the Civil Procedure Code or the Bihar Money Lenders Act to stand in the way of such a course being adopted. The order of the High Court valuing the properties passed in appeal in the valuation proceedings is final between the parties unless set aside by a higher tribunal or modified on a review application. But such an order cannot be said to be final in the sense that in no circumstances can the Court make a fresh valuation of the properties.**

**Hence where the decree-holder applies to the lower Court for re-valuation on the ground that certain events taking place after the valuation by the High Court had very much affected adversely the nature of the properties but the lower Court without going into the evidence as to whether there are sufficient grounds for making a re-valuation dismisses the application, holding that it is not open to it to make a fresh valuation the lower Court fails to exercise a jurisdiction vested in it by law: 31 A. I. R. 1944 Pat. 292,** *Rel. on.* **[Paras 4 and 5]**

**Annotation: — (44-Com.) C. P. C., S. 115 Note 11 Pt. 1.**

*Case referred:—*

**1. ('44) 23 Pat. 427 : 31 A. I. R. 1944 Pat. 292 : 219 I. C. 96, Kedar Nath v. Banwari Rai.**

*C. P. Sinha and G. C. Das*—for Petitioner.

*Mahabir Prasad, S. Mehdi Imam, K. K. Sinha, Lalnarain Sinha, Balbhadra Prasad and Krishna Chandra*—for Opposity Party.

**Sinha J.**—This application in revision arises under rather exceptional circumstances which have got to be stated, however shortly, in order to appreciate the points in controversy between the parties. The petitioner advanced a large sum of money to Babu Chandreshwar Prasad Narain Singh of Maksudpur on a simple mortgage of certain immovable properties which are mostly proprietary interests in a large number of villages. The mortgage bond is dated 16-2-1924. The mortgagee instituted a suit, being suit No. 27 of 1935, in the Court of the Subordinate Judge of Patna for sale. A preliminary decree for sale was passed for about six lacs of rupees, and was made final on 16-3-1937. Execution case No. 13 of 1938 was started; but, as the mortgagor's estate had gone under the Court of Wards, execution was stayed at the instance of the Manager, Court of Wards. But, soon after, the estate was released by the Court of Wards. Then followed certain infructuous proceedings at the instance of the judgment-debtor, who alleged satisfaction of the decree. The decree-holder took out another execution, and the judgment-debtor started proceedings under the Bihar Money-Lenders Act for valuation of the mortgaged properties. Ultimately, by his judgment, dated 16-12-1940, the learned Subordinate Judge fixed the valuation of the various items of the properties, comprising zamindari interest, forest land, buildings, or-

chards, etc. The learned Subordinate Judge had directed that fifteen times the net income from zamindari properties should be taken as the market price. Against the orders of the learned Subordinate Judge fixing the valuation, an appeal was preferred by the judgment-debtor, and the case was numbered as Miscellaneous Appeal No. 26 of 1941. The decree-holder's appeal, which was in the nature of a cross-appeal, was numbered as 57 of 1941. As a result of these proceedings, the execution remained stayed. During the pendency of the appeals in this Court, the original mortgagor-judgment-debtor died, and he was substituted on the record by his widow, and on her death, the opposite parties 1 to 5 came to be substituted. A Division Bench of this Court heard the aforesaid appeals arising out of the valuation proceedings, and the judgment of this Court is dated 23rd August 1946. The result of the judgment of this Court was that the appeal of the judgment-debtor was allowed in part, and the decree-holder's appeal substantially dismissed. This Court directed that the net income of the properties as determined by the learned Subordinate Judge should be increased on the basis of the income stated in the mortgage bond of the year 1924, and the enhanced net income should be multiplied by twenty in order to obtain the valuation. Similarly, the valuation of the buildings and the forests was also substantially increased. The net result of the order of this Court was that the total valuation fixed by the learned Subordinate Judge at Rs. 13,15,000 was enhanced approximately to twenty-five lacs of rupees.

[2] Subsequently, the decree-holder made an application to the Court below to the effect that the value of the zamindari properties as also of bakasht and forest lands had very much been affected adversely by certain recent legislations of the Provincial Legislature as also some impending legislation for the abolition of zamindari. He, therefore, prayed to the Court below for re-valuing the properties, keeping in view the following facts: (1) that the Bihar Private Forests Act 3 [III] of 1946 very much restricts the right of private individuals in forests, and authorises the Provincial Government to issue a notification under the Act practically assuming control of private forests also; (2) that the Bihar Tenancy (Second Amendment) Act 14 [XIV] of 1946 has so amended S. 40, Bihar Tenancy Act of 1885 as to deprive the landlord of the benefits of rise in prices after 1939, and given the tenants the right to claim commutation of rent on the basis of prices prevailing during the depression in the years 1930 to 1938; (3) that the Bihar Bakasht Disputes Settlement Act 13 [XIII] of 1947 makes it obligatory for zamindars to submit to arbitration when their rights to bakasht lands are disputed by tenants, which has the effect of very much depressing the value of bakasht lands, and (4) finally the proposed legislation, which has recently been introduced in the Provincial Legislature for abolition of zamindari and further proposing to grant compensation on the basis of five years' purchase in respect of considerable zamindaris like the one in question. It was also alleged that recently there had been floods, which had deposited sand on lands of many of the villages in mortgage, thus decreasing the productive capacity of lands in the zamindari generally. It was also stated that, in pursuance of the amendment of S. 40, Bihar Tenancy Act, the entire tenantry had made applications for commutation of rent, and it is apprehended that the commuted rent will be decreased by more than 50 per cent. of the present assets of the estate. It was contended before the learned Subordinate Judge that, as a result of these happenings, the value of the mortgaged properties had considerably diminished. Hence, it was prayed that fresh evidence may be recorded, and fresh valuation made on the basis of the new data to be supplied by the parties. The learned Subordinate Judge dismissed the application, holding that it was not open to the Court to make a fresh valuation of the properties. Hence this application in revision by the decree-holder.

[3] Mr. C. P. Sinha, appearing on behalf of the petitioner decree-holder, contended that the orders of the learned Subordinate Judge refusing to re-value the properties after recording fresh evidence in view of the fresh developments, referred to above, had refused a jurisdiction vested in him by law. He contended further that, on the authority of the Division Bench ruling of this Court in 23 Pat. 427,[1] it is open to the Court in a proper case to revise the valuation already made, as it was not such a final order between the parties as to be binding upon them for all times. The judgment-debtors-opposite-party contested the application by contending that the decree-holder had misconceived his remedy by making the application for a fresh valuation; that his remedy lay in an application for review of the judgment of this Court in the valuation matter, whereby this Court increased the valuation considerably; that, though the order of this Court in the valuation proceedings may not have been a final decree, it was a final order between the parties; that there is no provision either in the Code of Civil Procedure or in the Bihar Money-Lenders Act authorising the Court to revise the valuation once made; that, at any rate, the grounds urged for re-valuing the properties were wholly speculative and conjectural; and lastly, that, in

any view of the matter, there was no error of jurisdiction in the orders of the learned Subordinate Judge attracting the revisional jurisdiction of this Court.

[4] The most important question to be determined in this application is whether the order of this Court passed on appeal from the orders of the learned Subordinate Judge valuing the properties can be said to be binding on the parties for all times so as to prevent either the decree-holder or the judgment-debtors from asking the Court to come to a fresh valuation even if a proper case for such a re-valuation is made out. The Division Bench ruling of this Court in 23 Pat. 427,[1] is an authority for the proposition that no second appeal lies from an order valuing the properties to be sold in execution of a decree. I was a party to that judgment. While discussing the question whether the valuation once made was final between the parties for all times I made the following observations:

"One may easily conceive of circumstances where the valuation, once determined by the Court under S. 13, may not bind the parties for all times, that is to say, so long as the decree has not been satisfied and is capable of execution. Circumstances may so radically affect the value of the property once determined that the Court may have to revise the valuation previously made by itself; for example, a new legislation or the fluvial action of a river or the act of God may affect the value of the property for better or for the worse to such an extent that it would be manifestly unjust to the parties, or either of them, to hold them fast to the valuation once made by the Court before any of those circumstances supervened."

It would appear that this Court was of the opinion that the valuation was not such a final order as is contended for on behalf of the opposite party. Of course, generally speaking, the valuation proceedings do not occupy more than a few months, and the execution proceedings are thereafter carried to their conclusion with the practical result that the valuation binds the parties to the execution proceedings, and is given effect to by the Court in the execution proceedings. But, where, as in the present case, the valuation proceedings have taken about seven years, and it is alleged by one of the parties to the execution that the value of the properties has been materially affected by recent legislations of the Provincial Legislature and other events like fluvial action of the river, it becomes necessary to go into the question of valuation over again on such fresh materials as may be forthcoming. The Court, on going into all that fresh evidence, may come to the conclusion that the valuation has not been affected at all or it may come to the contrary conclusion. That is for the Court to decide. But it is not right to say that the Court is precluded from going into the question of fresh valuation whatever may have happened between the first valuation and the application for a fresh valuation. In my opinion, if a proper case is made out, it is open to the Court to make a fresh valuation of the properties to be sold in execution of a decree for payment of money. No authority has been cited before me laying down the proposition contended for on behalf of the opposite party that the valuation once made can never be revised even though circumstances may have completely changed the shape of things, radically affecting the value of the properties for the better or for the worse. I may also add that, when the decree-holder made an application for leave to appeal to His Majesty in Council in Privy Council Appeals Nos. 41 and 42 of 1946, which was heard by a Division Bench of this Court, consisting of Shearer and Ray JJ. it was contended on behalf of the judgment-debtors-opposite party that the order of the High Court was not final so as to entitle the decree-holder to go up in appeal to His Majesty in Council. Shearer J. gave effect to that contention, and held that no second appeal, including an appeal to His Majesty in Council, was permissible in such a case. Ray J. was inclined to the contrary view; but he did not dissent from the Division Bench ruling in 23 Pat. 427,[1] referred to above. The application for leave to appeal to His Majesty in Council was, therefore, dismissed. The opposite party are now contending that those very orders of this Court passed in appeal are final in the sense that in no circumstances can the Court make a fresh valuation of the properties. I am not prepared to accept the contention that the orders of this Court are final in that sense. The judgment of this Court was passed on the evidence recorded by the learned Subordinate Judge in 1940. Certainly, the order of this Court in the valuation proceedings at the appellate stage must be held to be final between the parties unless set aside by a higher tribunal or modified on a review application. Mr. Mahabir Prasad for the opposite party contended that the decree-holder should have moved this Court for review of its judgment, and should not have moved the learned Subordinate Judge for revising the valuation. In my opinion, there is no substance in this contention. The decree-holder did not move the Court below for re-valuing the properties on any of the grounds contemplated by R. 1 of O. 47, Civil P. C. It was not the decree-holder's case that there was any error apparent on the face of the judgment of this Court or that any new evidence has been discovered which was in existence at the time this Court gave its judgment but which could not have been discovered with due diligence for being placed before the Court below or before this Chart. The grounds on which the Court below was moved

for re-valuing the properties were that certain enactments had come into existence as a result of which the value of the properties sought to be sold in execution of the decree had been materially diminished and that by the fluvial action of the river, sand had been deposited in considerable areas which had affected the value of the bakasht lands. Those grounds would not be sufficient grounds for an application for review of judgment. Hence, there is no substance in the contention that the proper remedy available to the decree-holder was to make an application for review of the judgment of this Court. If I am right in the conclusion that it is open to the Court to make a re-valuation of the properties if proper and sufficient reasons are established for doing so, it follows that there is nothing in the Civil Procedure Code or in the Bihar Money Lenders Act to stand in the way of such a course being adopted.

[5] Whether there are sufficient grounds for making a re-valuation has not been determined by the Court below after going into evidence which was sought to be adduced on behalf of the decree-holder. The Court below appears to have taken the view that there is no warrant in law for making a fresh valuation of the properties, and, in that view of the matter the Court below refused to go into evidence. The grounds alleged for making a re-valuation on the face of them, are worthy of serious consideration. Whether or not those grounds would be established is a matter which must be determined after going into evidence, which has not been done so far. But the grounds cannot be brushed aside by simply characterizing them as speculative or conjectural. Those are grounds which may be established by good evidence or may not be; but that is a matter into which this Court cannot go at this stage. At this stage, the only question for determination by this Court is whether *prima facie* the grounds alleged are such as to justify the Court in reopening the valuation matter and going into it over again, and in my opinion, it cannot be said that those recent happenings can altogether be ignored as not having any effect on the value of the properties sought to be proceeded against. That being so, it cannot be said as it was urged on behalf of the opposite party, that there is no error in the exercise of jurisdiction in the orders of the Court below. When the Court below refused to go into evidence which was sought to be adduced by the decree-holder in support of his allegations that the value of the properties had been materially affected by those recent happenings, the Court below clearly refused to exercise a jurisdiction vested in it by law. If the Court below, after receiving evidence, had held that those events had not affected the valuation of properties, there would have been an end of the matter, and this Court would not then have interfered in its revisional jurisdiction; but when the Court below refused to consider the case on merits on evidence to be adduced by the parties, it certainly refused to exercise the powers vested in it by law.

[6] It was urged on behalf of the opposite party judgment-debtors that the decree holder had been trying to delay the sale of the properties, as interest was accumulating and the decree-holder was in no hurry to sell the properties for realisation of his decretal debt. It was also urged that the judgment-debtors were very much in earnest about paying off the decree as quickly as possible. It was, therefore, suggested that the properties should be sold without any further delay and the decree satisfied. Ordinarily, it is the judgment-debtors who obstruct the speedy realisation of a decree. The position may be different in this case. But the decree-holder also expressed, through his counsel, his desire to have his decree satisfied as early as possible. Hence, both parties' lawyers expressed their keen desire that the execution proceedings should be brought to a successful conclusion without any further delay. But, if the decree-holder is so minded as to delay the execution of the decree, the Court will be helpless to assist the judgment-debtors in their desire to have the properties put up to sale as early as possible. The Bihar Money Lenders Act does not compel the decree-holder either to bid for the property or to purchase the property at the price fixed by the Court. It is open to the decree-holder either to refuse to bid at all or to bid only up to a certain sum. If other bidders are not forthcoming to bid up to the valuation fixed by the Court, the property cannot be sold unless the decree-holder :

> "consents in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for such property in the sale proclamation."

But all the same it is in the interest of all the parties concerned that the properties should be sold as expeditiously as possible, otherwise events may happen which may introduce further complications or may tend further to diminish the value of the properties. At the same time, the legislature or the Courts may be generous to the judgment-debtors, but they have also got to be just to the decree-holders. Hence, with a view to safeguarding the interests of all the parties to this litigation, it is only just that a sufficient portion of the properties already valued should be advertised for sale after the decree-holder has been given the opportunity of choos-

ing the properties which he would prefer to be sold in the first instance in satisfaction of his entire claim under the decree. When the decree-holder has expressed his choice, those properties should be advertised for sale at the value fixed for them in accordance with the judgment of this Court in the valuation matter. If the decree-holder himself or a third party bids for those properties up to the valuation fixed by the Court, or for a higher value, those properties will be sold and the money applied to the satisfaction of the decree either in its entirety or *pro tanto*. But if the sale proves infructuous, that is to say, if neither the decree-holder nor any third parties bid for those properties or some of them up to the amount fixed by the Court as the value of those properties, and on that account, the properties cannot be knocked to the highest bidder, that will be an indication as to the valuation of the properties. In that event, if the whole or any portion of the decree remains unsatisfied, the Court will value such of the properties as the decree-holder chooses afresh, and then a second sale proclamation will have to be issued on a valuation to be subsequently fixed by the Court. It is only in this way that the conflicting view points of the judgment debtors and the decree-holder can be reconciled.

[7] In view of these considerations, the orders passed by the Court below are set aside, and it is directed that the executing Court will proceed with issuing the sale proclamation as quickly as possible in respect of such of the properties as may be chosen by the decree-holder. If the sale proclamation results in a sale of the properties in accordance with the provisions of the Bihar Money Lenders Act and sufficient amount realised so as to liquidate the entire decretal dues of the decree-holder nothing further need be done. But, if the sale proclamation does not result in a sale of the properties, either all of them or some of them as originally advertised, such of the properties as are not sold shall have to be put up for sale again after a re-valuation is done on receiving such evidence as the parties may think fit to adduce at that stage.

[8] The rule is accordingly made absolute with costs; hearing fee five gold mohurs.

**Mukharji J.** — I agree.

D. H. *Rule made absolute.*

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**A. I. R. (35) 1948 Patna 362** *[C. N. 127.]*

MANOHAR LALL AND MUKHARJI JJ.

*Rai Kumar Singh and another* — *Appellants* v. *Abhai Kumar Singh and others* — *Respondents.*

**A. F. O. Nos. 84 and 117 of 1946 and C. R. No. 173 of 1946, Decided on 8-5-1947, from order of 1st Addl. Sub-Judge, Bhagalpur, D/- 8-2-1946.**

**(a) Civil P. C. (1908), S. 47—In partition between *S* and his sons *A*, *J* and *R* mortgage bond executed by *M* falling to share of *S* and his sons *A* and *J*—*S*, *A* and *J* obtaining final mortgage decree against *M* and putting it to execution — During execution *S* dying — Petition by *R* to be added as one of the decree-holders—Petition supported by *M* — Petition dismissed—*Held*, question fell under S. 47 and appeal lay.**

**In a partition between *S* and his sons *A*, *J* and *R*, a mortgage bond executed by one *M* was allotted to the share of *S* and his sons *J* and *A*. *S*, *A* and *J* obtained a final decree on this mortgage. During the pendency of the execution proceedings *S* died and *R* filed a petition praying that his name should be added as one of the decree-holders. The judgment-debtor *M* supported this petition. This petition was dismissed by the Court. *R* appealed :**

***Held*, that the decision of the question affected the judgment-debtor *M* and hence the question fell within S. 47. The appeal was therefore maintainable : 24 A. I. R. 1937 Cal. 177, *Rel. on*. [Para 16]**

**Annotation : ('44-Com.) Civil P. C., S. 47, N. 5.**

**(b) Family settlement — It is not necessary to show existence of family dispute as to title.**

**In order that an agreement between the members of the family can be treated as a family settlement, it is not necessary that it must be shown that there was a dispute as to title between the parties and that the agreement was by way of accepting the antecedent title of the parties to the properties : *Case law referred*. [Para 25]**

**(c) Transfer of Property Act (1882), S. 6 (a) — Partition between *A* and *B* — Compromise providing that they would not claim any share which would otherwise have accrued to them on death of either of them—Compromise is not hit by S. 6 (a).**

**In a partition suit between *A* and *B*, the parties arrived at a compromise. The shares of each were defined and they went into immediate possession of the properties. It was agreed that they would not claim any share which would otherwise have accrued to them on the death of either of the parties :**

***Held*, that the parties did not deal with any future rights in any other property. They were anxious that the property which was being allotted to either of the parties should never go out of that branch. The compromise was not hit by any rule of Hindu law or by the provisions of S. 6 (a), T. P. Act: *Case law referred*. [Paras 40 & 41]**

**Annotation : ('45-Com.) T. P. Act, S. 6, N. 4.**

**(d) Family settlement — Family settlement cannot be upheld if it offends any rule of law : 25 A. I. R. 1938 P. C. 181, *Rel. on*. [Para 30]**

**(e) Civil P. C. (1908), O. 23, R. 3—Compromise in partition suit — Decree based on compromise — Validity of agreement not subject-matter of dispute in partition suit—Party can, without bringing suit to set aside compromise decree, show that compromise cannot be enforced.**

**In a partition suit the parties arrived at a compromise and a decree was passed in terms of the compromise. The validity of the compromise was never the subject-matter of the dispute in the partition suit. Subsequently, one of the parties contended that the compromise violated S. 6 (a), T. P. Act and was therefore not enforceable in a Court of law. The infirmity of the compromise did not depend on proof of any extraneous facts but was patent on the face of it :**

***Held*, that the party was entitled to show without bringing a suit to set aside the compromise decree, that the impugned agreement though embodied in a compromise decree could not be enforced in a Court of law.**

[Para 53]

**Annotation :** ('44-Com.) Civil P. C., O. 23, R. 3, N. 28.

*Cases referred* :—

1. ('37) 24 A. I. R. 1937 Cal. 177 : 171 I. C. 517, Hari Kishun v. Gopeshwar Dedhuria.
2. ('23) 50 I. A. 239 : 10 A. I. R. 1923 P. C. 189 : 50 Cal. 929 : 74 I. C. 499 (P. C.), Anand Mohan Roy v. Gour Mohan Mallick.
3. ('16) 39 Mad. 554 : 3 A. I. R. 1916 Mad. 579 : 29 I. C. 241, Lakshmi Narayana Jagananda Raju v. Varaha Lakshmi Narasimha.
4. ('18) 45 I. A. 35 : 4 A. I. R. 1917 P. C. 95 : 45 Cal. 590 : 27 C. L. J. 296 : 44 I. C. 408 (P. C.), Amrit Narayan v. Gaya Singh.
5. ('07) 31 Bom. 165, Shamshuddin Goolam Husain v. Abdul.
6. ('18) 45 I. A. 118 : 5 A. I. R. 1918 P. C. 70 : 40 All. 487 : 47 I. C. 207 (P. C.), Kanhai Lal v. Brijlal.
7. ('68) 3 Agra H. C. R. 82, Lalla Oudh Behari Lal v. Ranee Mewa Koonwer.
8. ('74) 1 I. A. 157 : 13 Beng. L. R. 312 : 3 Sar. 354 (P. C.), Rani Mewa Kuwar v. Rani Hulas Kuer.
9. ('11) 38 I. A. 87 : 33 All. 356 : 10 I. C. 477 (P. C.), Khunni Lal v. Govind Krishna Narain.
10. ('14) 18 C. W. N. 929 : 1 A. I. R. 1914 P. C. 44 : 24 I.C. 309(P.C.), Mt. Hiran Bibi v. Mt. Soban Bibi.
11. ('17) 2 Pat. L. J. 578 : 4 A. I. R. 1917 Pat. 538 : 41 I. C. 631, Mt. Diltor Koer v. Harku Singh.
12. (1867) 2 Ch. 294 : 36 L. J. Ch. 419 : 16 L. T. 42 : 15 W. R. 657, Williams v. Williams.
13. ('06) 4 C. L. J. 323, Helan Dasi v. Durga Das.
14. ('30) 17 A. I. R. 1930 All. 687 : 52 All. 716 : 125 I. C. 1, Pokhar Singh v. Dulari Kunwar.

14a. ('38) 65 I. A. 213 : 25 A. I. R. 1938 P. C. 181 : I. L. R. (1938) Lah. 313 : 32 S. L. R. 760 : 174 I. C. 868 (P. C.), Partap Singh v. Sant Kuar.

15. ('24) 5 P. L. T. 375 : 11 A. I. R. 1924 Pat. 736 : 84 I. C. 208, Jagdam Sahay v. Rup Narain Mahton.
16. ('15) 27 I. C. 701 : 2 A. I. R. 1915 All. 486, Mahomed Hashmat Ali v. Kaniz Fatima.
17. ('11) 33 All. 414 : 9 I. C. 935, Kanti Chandra v. Ali Nabi.
18. ('11) 33 All. 457 : 9 I. C. 530, Nazir-ul-Huq v. Fyaz-ul-Rahman.
19. ('82) 8 Cal. 138, Ram Nirunjan v. Prayag Singh.
20. ('39) I. L. R. (1939) All. 950 : 26 A. I. R. 1939 All. 689 : 184 I. C. 531 (F. B.), Uma Shankar v. Ramcharan.
21. ('19) 41 All. 611 : 6 A. I. R. 1919 All. 371 : 51 I. C. 919, Chahlu v. Parmal.
22. ('36) 17 P. L. T. 636 : 23 A. I. R. 1936 P. C. 304 : 164 I. C. 340 (P. C.), Mt. Binda Kuer v. Lalita Prasad.
23. ('33) 14 P. L. T. 27 : 20 A. I. R. 1933 Pat. 165 : 149 I. C. 491, Lalita Prasad v. Sarnam Singh.
24. ('20) 24 C. W. N. 105 : 6 A. I. R. 1919 P. C. 27 : 50 I. C. 812 (P. C.), Mt. Hardei v. Bhagwan.
25. (1895) 2 Ch. 273 : 64 L. J. Ch. 523 : 72 L. T. 703 : 43 W. R. 567, Huddersfield Banking Co., Ltd. v. Lister.
26. ('03) 26 Mad. 31, Lakshman Swami Naidu v. Rangamma.
27. ('07) 30 Mad. 255, Ramasami Naik v. Ramaswami Chetty.
28. ('29) 16 A. I. R. 1929 P. C. 289: 118 I. C. 7 (P. C.), Charles Herbert Kinch v. Edward Keith Wallcott.
29. (1896) 1 Ch. 673 : 65 L. J. Ch. 432 : 74 L. T. 193: 44 W. R. 540, Linsworth v. Wilding.
30. (1897) 2 Ch. 534 : 66 L. J. Ch. 684 : 77 L. T. 57 : 45 W. R. 675, Wilding v. Sanderson.
31. ('36) 23 A. I. R. 1936 Bom. 301 : 164 I. C. 703, Basan Gouda Giriyeppa Gouda v. Basalingappa Mallan Gouda.
32. ('11) 35 Bom. 371 : 11 I. C. 984, Cowasji v. Kisondas.
33. ('23) 47 Bom. 597 : 10 A. I. R. 1923 Bom. 276 : 73 I. C. 196, Basangouda v. Irgowadati Kallangouda.
34. (1895) 1 Ch. 37 : 64 L. J. Ch. 189 : 71 L. T. 594: 43 W.R. 131, In re South American and Mexican Co.
35. (1899) 1899 A. C. 114 : 68 L. J. P. C. 25: 79 L. T. 35, G. N. W. C. Rly. Co. v. Charlebois.

*P. R. Das, L. K. Jha, C. P. Sinha and Prem Lall (in M. A. No. 84 of 1946) and Baldeva Sahay, and G. C. Dass (in M. A. No. 117 of 1946)*— for Appellants.

*Dr. D. N. Mitter, P. L. Banerji, B. C. De, S. C. Mazumdar, K. D. Chatterji, G. C. Das, A. C. Mitra and S. K. Mazumdar* — for Respondents.

**Manohar Lall J.** — These two appeals and the connected civil revision which has been filed *ex cautela* in case it is held that the appeal is not maintainable have been heard together at great length and arise out of an order passed in execution proceedings. The question for decision is difficult and interesting and has kept learned counsel on both sides engaged in streneous, able and exhaustive arguments for four days before us. The question in the main is the applicability of S. 6 (a), T. P. Act, to a term in a compromise decree.

[2] Fortunately, the facts are not in dispute at all. Rai Bahadur Sukhraj Ray by his marriage with Kiran Kumari Devi had two sons, Abhai Kumar and Jai Kumar. Rai Kumar is his son from a predeceased wife. This well-known family of Bhagalpur was possessed of considerable moveable and immovable property and had large money-lending transaction. In the year 1926, Rai Kumar Singh and his minor son Sujas Kumar Singh filed a partition suit in the Court of the Subordinate Judge at Bhagalpur. The defendants were Rai Bahadur Sukhraj Ray, the father, and Abhai Kumar and Jai Kumar, the brothers, and Kiran Kumari Devi, the step-mother of the plaintiff. Mt. Genda Kumari, the mother of Rai Bahadur Sukhraj Ray, was also made defendant 5 in the action.

[3] The plaintiffs in the plaint alleged that by reason of a special custom prevailing in this

family, the females were excluded from inheritance or participation in any share in the event of a partition of the joint family property, but were only entitled to maintenance. On this allegation the share of the plaintiffs was claimed to be one-fourth. On behalf of the defendants and specially on behalf of Kiran Kumari Devi and Mt. Genda Kumari the existence and validity of the alleged custom was stoutly denied. They also raised disputes as to the extent of the jewelleries which could be treated as joint family property. Various other disputes and differences arose between the parties, but they were all settled by a compromise petition filed in the Court on 4-8-1927. By that compromise *inter alia* the share of the plaintiffs which was claimed by them to be one-fourth in the plaint, but which might have been reduced considerably after prolonged investigation, was agreed to be 7/30th for the reason given that Mt. Genda Kumari was relinquishing her share in lieu of maintenance and the plaintiffs were relinquishing their share in the properties which would be open to inheritance after the death of defendant 4, the step-mother. Elaborate provisions were made in the compromise petition by which the parties purported to settle the various disputes that could conceivably arise in connection with the partition of such a big joint family estate. It was provided also in para. 9 that if any dispute arose in carrying out the terms of the compromise or if any term or dispute was left out by oversight and not taken into consideration by the compromise petition, it would be brought to the notice of Babu Ranjit Singh and Babu Dharindra Sen (who effected the settlement between the parties) and each party will be bound to act according to the advice given by them in respect of any matter of difference and in case there was any difference between the said two gentlemen in their respective advices, the parties will be bound by the decision of this Court at the time of drawing the final decree in the suit. In accordance with this compromise petition, a preliminary decree for partition was passed. Order No. 202 of 4-9-1930 (Ex. 5 (c) p. 22) shows that after this compromise a dispute arose between the parties as to the share which the plaintiffs had been given in the jewelleries of the joint family — the defendants alleging that the plaintiffs were not entitled to 7/30th share in the jewelleries but only one-fifth share. The learned Subordinate Judge decided that out of the jewelleries, after handing over jewelleries worth Rs. 5000 to defendant 4, the balance was agreed to be treated as joint family property and so the plaintiffs were entitled to 7/30th share in the jewelleries. Various other disputes had apparently cropped up then between the parties but ultimately the Court was asked to prepare the final decree in accordance with another compromise petition which was filed on 18-9-1930. This compromise petition is at p. 29. In para. 2 reference is made to the compromise petition of 4-8-1927 by which the plaintiffs were allotted 7/30th share in all the moveable and immovable properties and to the preliminary decree passed on 8-8-1927 embodying the terms of that compromise. In para. 3 it is stated that subsequent to the passing of the preliminary decree many disputes relating to the parties and connected matters arose, but they have been finally determined either by an order of the Court or by mutual agreement amongst themselves which the parties were now accepting as final. Paragraph 4 is important and has been the subject of elaborate arguments before us and must be quoted in full :

"That as regards the share of the parties by private agreement and compromise the plaintiffs have been allotted 7/30th share in all the joint family properties subject to the exceptions, mentioned in the various paragraphs of the preliminary decree referred to above and defendants 1, 2 and 3 have each been allotted 1/5th share and defendant 4 has been allotted 1/6th share and defendant 5 has relinquished her share and it has been finally agreed that on the demise of defendants 1, 2, 3 and 4 the plaintiffs or their heirs shall have no claim whatever to the shares allotted to the said defendants and likewise defendants 1 to 4 or their heirs shall have no claim whatsoever to the share allotted to the plaintiffs on their demise."

By paragraph 5 it was agreed that defendant 5 would be given a monthly allowance of Rs. 250 for her life and this sum was payable by the plaintiffs and defendants 1 to 4 in proportion to their respective shares the share of the allowance payable by the plaintiffs was made a charge on village Sharfuddinpur and similarly the share of the allowance payable by defendants 1 to 4 was made a charge on village Jotram Rai.

[4] The joint family had made a number of investments which were divided in the manner set out in the compromise petition, but reference in particular must be made to a certain money-lending transaction with the father of Mahashay Amarnath Ghosh. In para. 12 of the compromise petition it is stated that plaintiff 1 on behalf of the plaintiffs having exercised his right of selection regarding the investments has taken charge of the documents of securities and other papers connected therewith a list of which is attached as per sch. II etc. and the other investments not mentioned in Sch. II of this petition have been assigned to defendants 1 to 4 exclusively and they shall be entitled to realise the interest and the principal thereof. Item 6 in Sch. II which was thus selected by the plaintiffs was a sum of Rs. 2,33,865-9-0 due from Mahashay Taraknath Ghosh. The amounts due from the various debtors in this schedule were calculated includ-

ing interest up to 31-7-1927. A few lines after it is stated :

"Item 6 was selected by the plaintiffs originally but afterwards defendant 1 chose to keep the Rokka executed by Mahashay Taraknath Ghosh himself and in lieu of this, defendant 1 paid Rs. 2,56,890 to plaintiffs on 28-8-1928 including interest."

It is, therefore, clear that the plaintiffs' share of the amount due from Mahashay Tarak Nath Ghosh was realized by the plaintiffs immediately on the date of the compromise petition.

[5] In accordance with the final adjustment between the parties the compromise was recorded by the Court and the final decree drawn up on the terms of this compromise petition was pronounced on 17-9-1930. Some amendment was made to this compromise decree by an order dated 11-7-1931, but this is not relevant to the present enquiry.

[6] The mortgage bond executed by Mahashay Ghosh was thus allotted to the share of Rai Bahadur Sukhraj Ray and his two younger sons, defendants 2 and 3, and to his wife, Kiran Kumari. These persons along with Nava Kumar minor son of Abhai Kumar, instituted a suit against Mahashay Amarnath Ghosh to enforce the mortgage and obtained final decree on 24-10-1944, for about Rs. 30,00,000 carrying future interest at six per cent. per annum till realization. This decree was put into execution on 21-11-1944 and during the pendency of the execution proceedings Rai Bahadur Sukhraj Rai died on 25-11-1945.

[7] On 21-12-1945, a petition was filed on behalf of the two sons, the widow and the grandson of Rai Bahadur Sukhraj Rai and also by five more persons alleging to be the minor sons of Abhai Kumar and Jai Kumar praying that the name of the deceased Rai Bahadur be struck off and in his place the two sons and his widow who were already on the record should remain as decree-holders and the names of the remaining petitioners should also be added as decree-holders. It was alleged that the deceased at the time of his death represented the interest of all the petitioners as karta of the joint family and it was further alleged that he had left a will in favour of his two sons dated 24-11-1945, for which steps will be taken in probate Court for grant of letters of administration.

[8] On the same day Rai Kumar Singh, the eldest son of the deceased who was plaintiff 1 in the partition suit filed a petition in which he prayed that the name of the deceased should be removed and the name of the petitioner should be added as one of the decree-holders on the allegation that the deceased Rai Bahadur died separate from his sons and grandsons as a result of the partition decrees of 1927 and 1930.

[9] On 12-1-1946, the judgment-debtor also filed a petition supporting Rai Kumar Singh and raised objections regarding the addition of petitioners 5 to 9 namely the other grandsons of the deceased, but these objections were not pressed by the judgment-debtor at the time of hearing.

[10] The two sons of the deceased decree-holder who were themselves co-decree-holders seriously objected to this addition of the eldest son and raised three substantial objections : (i) that the petitioner Rai Kumar Singh alone separated as the result of the partition decree, but the other members including the deceased Rai Bahadur remained joint as members of a joint Mitakshara family and, therefore, these survivors alone were now entitled to execute the mortgage decree ; (ii) that even if it is held that there was a disruption of the entire joint family of the deceased and his sons by the partition decree, Rai Kumar Singh could not claim any share in the mortgage decree as the heir of the father because Rai Kumar Singh had relinquished the same by the clear agreement embodied in para. 4 of the final compromise-decree of 1930 and that so long as that decree stood unreversed, it could not be disregarded on the ground that the agreement amounted to an encroachment on any provision of law like S. 6 (a), T. P. Act; (iii) that Rai Kumar was estopped from claiming the property by the doctrine embodied in S. 43, T. P. Act.

[11] On 21-1-1946, Rai Kumar filed another petition to the effect that his original application dated 2-1-1946, that he should be added as co-decree-holder should be treated as a petition under S. 47, Civil P. C., read with O. 21, R. 16, Civil P. C.

[12] The learned Subordinate Judge by Order No. 58 dated 21-1-1946 decided, overruling the objection of the decree-holders, that the petition of Rai Kumar should be treated as a petition under S. 47 read with O. 21, R. 16, Civil P. C.

[13] The main evidence adduced by the parties before the Subordinate Judge was the pleadings, the two compromise decrees and the order-sheet in the partition suit, the plaint in the mortgage suit against Amar Nath Ghosh and certain other plaints and an affidavit—the certified copies of the entries in Register D regarding the village of this joint family were also filed to show that the parties had separated as a result of the partition decree. The judgment of the learned Subordinate Judge shows that some oral evidence was also given, but that has not been printed in the paper-book before us, nor has our attention been drawn to it. It was also urged by the objectors before the learned Subordinate Judge that the compromise decree was in the

nature of a family arrangement or family settlement.

[14] After hearing elaborate arguments, the learned Subordinate Judge pronounced a careful and well-considered judgment on 8-2-1946. He came to the conclusion that he was satisfied that there was a complete disruption of the joint family as a result of the partition decree and that thereafter the parties continued separate not only between the plaintiffs and the defendants but also between the defendants *inter se*— this finding has not been challenged before us on behalf of the respondents. He accepted the contention of the decree-holders that Rai Kumar was bound by the terms of para. 4 of the compromise petition as it was embodied in the compromise decree which had not been set aside and was still in full force, but he expressed the view that the agreement as embodied in the final decree had not the characteristic of a family arrangement, and that were it not for the compromise decree, which had not been set aside, he would have held that the agreement was void in view of the provisions of S. 6 (a), T. P. Act. He also overruled the contention of the defendants that the plaintiffs were estopped from claiming their rights to their share in the inheritance of their deceased father. In the result he dismissed the application of the plaintiffs to be joined as co-decree-holders.

[15] Against this order miscellaneous appeal NO. 84 of 1946 has been filed by Rai Kumar Singh. MISC. APPEAL NO. 117 of 1946 has been filed by the judgment-debtor and in case it is held that the appeal of Rai Kumar Singh is not maintainable he has also filed C. R. NO. 173 of 1946.

[16] When these appeal and the civil revision were called on for hearing, learned counsel for the decree-holders raised a preliminary objection that the appeal of Rai Kumar was not maintainable as the question in dispute between him and the decree-holders was not a question which related to the execution, discharge or satisfaction of the mortgage decree as between the parties to the suit. In our opinion, this objection is without any substance for two reasons, firstly because we are bound to decide the question in MISC. APPEAL NO. 117 of 1946 between the judgment debtor and the decree-holders, and secondly because the decision of the question affects the judgment-debtor and, therefore, the question falls within S. 47, Civil P. C. The matter is covered by authority: *see* A. I. R. 1937 Cal. 177.[1] Accordingly the preliminary objection is overruled.

[17] Mr. P. R. Das on behalf of the appellant Rai Kumar argued (1) that the compromise decree does not require to be set aside and it must be treated as no more than an agreement between the parties even though the command of the Judge who directed the compromise to be recorded was super-added to it. He relied upon several well-known English cases in support of the view that the agreement even if embodied in a compromise decree attracted to it all its incidents and infirmities and, therefore, it was open to him to show that the agreement was void both under the Transfer of Property Act and under S. 23, Contract Act; (2) that the agreement was not a family arrangement, and that even if it was assumed to be a family arrangement it was still void as it offended the provisions of S. 6 (a), T. P. Act, and S 23, Contract Act.

[18] Mr. Baldeva Sahay appearing on behalf of judgment-debtor in support of his appeal argued, while adopting the arguments of Mr. P. R. Das, in addition that under the provisions of O. 21, R. 16, Civil P. C., the legal representatives of the deceased Rai Bahadur were his three sons under the Hindu law and, therefore, all of them should be held entitled to execute the decree as co-decree holders. He also argued that the agreement and the decree should have been registered under the provisions of S. 17, Registration Act, and this not having been done, the argument could not be enforced.

[19] Mr. P. L. Banerji, who appeared on behalf of some of the respondents, submitted that the compromise decree should not be treated as void and unless it was vacated or set aside by a regular suit, the agreement contained in para 4 of the compromise decree remained binding on the parties. He also urged that the compromise decree should have been treated by the Subordinate Judge as embodying a genuine and bona fide family arrangement or family settlement and, therefore, was not hit by any of the provisions of the Transfer of Property Act or the Contract Act.

[20] Dr. D. N. Mitter in support of the case of the other decree-holders adopted Mr. Banerji's argument and elaborated it by drawing attention to various authorities of their Lordships of the Judicial Committee.

[21] It will be seen that the two substantial points that emerge for our decision are whether the compromise decree can be treated as binding between the parties in these proceedings, and whether the impugned agreement embodied in the compromise decree must be held to be void. It is convenient to take up the second point for decision first. It is now well-settled on the authorities and this is not and could not be denied before us—that a transfer or an agreement to transfer by an expectant heir of his chance of succeeding to an estate—a *spes successionis*—is void under S. 6 (a), T. P. Act. See amongst others the case in 50 I. A. 239[2] where their Lordships

approved of the view expressed by Wallace C. J. and Tyabji J., in 39 Mad. 554,[3] in which it was held that the Transfer of Property Act did not permit a person having expectations of succeeding to an estate as an heir to transfer the expectant benefits, and the oft-cited case in 45 I. A. 35[4] where it was held that the next reversioner to an estate held under the Hindu law by a female for her life had no interest in *præsenti* in the property; until it vested in him he had no interest which he could assign or relinquish or even transmit to his heirs, and that the guardian of a minor reversioner could not bind him by purporting on his behalf to enter into a compromise by which the female holder relinquished the estate to other relatives; nor was the minor bound by an award or decree made in pursuance thereof, and the case in 31 Bom. 165[5] approved by their Lordships in the equally oft-cited case in 45 I. A. 118.[6]

[22] But the critical question for determination is whether the agreement embodied in the compromise decree can be regarded as a family arrangement or the settlement of a family dispute.

[23] Mr. P. R. Das objected that the presentation of this aspect of the case was not open to the respondents inasmuch as it was never pleaded in any of the petitions filed on behalf of the decree-holders that the agreement in question should be treated as a family arrangement or a family settlement. I am not disposed to agree with this contention because the learned Subordinate Judge has elaborately discussed the question on hearing arguments and his judgment does not state that any such objection on behalf of the appellants was raised before him. Dr. D. N. Mitter who appearing on behalf of the respondent also appeared in the Court below, and he assures us that no objection whatsoever was raised on behalf of the appellants in the Court below. Mr. L. K. Jha who appears on behalf of the appellants here and who appeared in the Court below, was not in a position to challenge this statement. Moreover all the evidence that the parties desired to adduce was adduced (we were not informed that further evidence could be given) and the question could be and has been determined upon the pleadings and the compromise decrees and the various orders passed by the Subordinate Judge in partition suit and the admitted facts. I, therefore, overrule the preliminary objection.

[24] Mr. P. R. Das then submitted that in order that an agreement between the members of the family could be treated as a family settlement, it must be shown that there was a dispute as to title between the parties and that the agreement was by way of accepting the antecedent title of the parties to the properties and relied in support of his argument on a number of cases and in particular on 3 Agra H. C. R. 82,[7] 1 I. A. 157[8] at p. 187, 38 I. A. 87,[9] 18 C.W. N. 929[10] and 2 Pat. L. J. 578.[11]

[25] I do not agree with Mr. P. R. Das that the family settlement or family arrangement must be preceded by a family dispute of title. The leading English case on the point is (1867) 2 Ch. 294,[12] in which it was held that a family arrangement may be upheld by the Court although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the Court will not consider the quantum of the consideration. Turner L. J. dealt with a similar argument advanced by Mr. P. R. Das, at p. 304 in these words:

> "It was strongly argued for the appellant that this case does not fall within the range of those authorities: that those cases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not, and could not be, any doubtful or disputed right but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much farther than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property. The re-settlement of family estates, upon an arrangement between the father and the eldest son on his attaining twentyone, may well be considered as a branch of these cases, and certainly this Court does not in such cases inquire into the quantum of consideration."

This view has been adopted consistently in a large number of cases in the Indian High Courts and it is only necessary to refer to the judgment of that distinguished Judge, Sir Ashutosh Mukherji, in 4 C. L. J. 323,[13] at page 330. See also the case in A. I. R. 1930 All. 687,[14] where after referring to the quotation from Lord Halsbury in his Laws of England, Vol. 14, 540, it was observed that the avoidance of a family dispute and not the existence of a family dispute is a ground which validates a family arrangement.

[26] The case in 2 Pat. L. J. 578,[11] relied on by Mr. Das itself illustrates that an arrangement between the members of a family will be treated as a family settlement even though there is no dispute as to antecedent title. In that case Khatan Koer with the consent of her two daughters then living had made over a third of the property to her daughter's son Shivnandan and this was held to be a family arrangement although there was no claim to any antecedent title between Khatan Koer and her daughters or daughter's son — unlike the dispute that was

settled earlier between Khatan Koer and Poona Koer. Nor do the other cases relied on by Mr. Das support his contention. In the leading case in 38 I. A. 87,[9] which was followed in 18 C. W. N. 929,[10] the family settlement in question was held to be not an alienation by a limited owner but a settlement between several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively, and it was expressly pointed out that this arrangement did not confer any new distinct title on the parties. In this case there was actually a family dispute. But these cases do not lay down that it is essential that there should be a family dispute as to the title before a settlement can be regarded as a family arrangement.

[27] But it is unnecessary to pursue the matter in the present case as here there was a genuine dispute started by the son who actually instituted a partition suit against his father and step-brothers. In that suit he disputed that any share could be given to the step-mother and the grand-mother, and it was in *bona fide* settlement of this and other disputes that cropped up between the members of the family that the agreement in question was entered into. I must, therefore, hold that this was a family settlement in which the plaintiffs took a larger share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other party defendants. It can also be treated as a compromise of a doubtful claim set up by the plaintiffs with regard to their share in the properties which would have gone to the step-mother and the grand-mother.

[28] For these reasons, I am of opinion that the learned Subordinate Judge was wrong in coming to the conclusion that the agreement in question was not in the nature of a family arrangement or a family settlement. This arrangement was undoubtedly for consideration, and even if it was open to us to scan the quantum of the consideration—which the Courts do not ordinarily do in family arrangement—I would be prepared to hold that the agreement was for good consideration, it stiffled a ruinous litigation, preserved the honour and peace amongst this well-known family of Bhagalpur, and gave to each of the parties benefit in *præsenti* also.

[29] Mr. P. R. Das then contended that even if it was held that the agreement was a family settlement, the family settlement has offended the rule of law and, therefore, S. 6(a), T. P. Act, comes into play to render the agreement void. Mr. P. L. Banerji on the other hand contended that the agreement in question does not offend the rule of S. 6 (a), T. P. Act, as the impugned agreement is attached to the very property which is being allocated to the parties and that the agreement does not deal with any other property which was not then the subject of partition.

[30] It is elementary that a family arrangement cannot be upheld if it offends any rule of law. It is enough to refer to the recent Privy Council case in 65 I. A. 213,[14] where Sir Shadi Lall considered a similar argument in these words at page 217:

"It is argued, however, that the transaction should be upheld because it was a family settlement. Their Lordships cannot assent to the proposition that a party can, by describing a contract as a family settlement, claim for it an exemption from the law governing the capacity of a person to make a valid contract. It is true that if a compromise has been entered into in good faith by the manager of a joint Hindu family, or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family, and that he was, therefore, a party to the compromise. This rule does not offend against any law governing a contract."

[31] It will be also observed from the facts at page 217 that in that case Gujar Singh, who adopted the role of the guardian of the minor Basant Kuar, was found to be neither appointed her guardian by any Court, nor could he claim that status under the law applicable to her.

[32] Has the family arrangement then offended any rule of law? A large number of cases bearing on the point have been cited before us, but I do not wish to examine all these as the question before us can be satisfactorily decided by relying on two cases of our own High Court. I would also notice some important cases of other High Courts that appear to be in point.

[33] I have already referred to the case in 2 Pat. L. J. 578,[11] where the learned Chief Justice upheld the family arrangement by which the daughters of Khatan Kuer on obtaining possession in 1891 were found entitled to make any agreement with each other that they pleased regarding the property in their possession; the arrangement was that each of the daughters and Shivanandan would be the malik of his or her share for their lives.

[34] 5 P. L. T. 375,[15] contains an exhaustive discussion of the Indian and English cases that are usually cited in this connection — including the cases cited before us. It was held at page 398

following the case in 27 I. C. 701,[16] that there was nothing illegal in a person for good consideration contracting not to claim a share in a property in the event of his becoming entitled to it on the decease of a living person and that S. 6, T. P. Act, did not affect such a contract. The Privy Council cases in 40 ALL. 487,[6] 33 ALL. 356[9] and 18 C. W. N. 929[10] were referred to as examples of the distinction between possibilities coupled with interest and bare or naked possibility such as the hope of inheritance entertained by the heir.

[35] *Allahabad cases*:—33 ALL. 414[17] upheld the family settlement whereby certain Hindu brothers divided the family property belonging to them amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving brothers. The argument based upon S. 6 (a), T. P. Act is thus dealt with at page 418 :

"Durga Shankar was not dealing with an expectant interest in property. He and the other parties to the agreement of compromise were dealing with the property, which at the time belonged to them, and we are unable to hold that a provision, whereby, upon a family settlement such as this was, brothers agreed that upon the death of any of them without male issue the share to which he should be entitled, should go to the other brothers, is in contravention of Hindu law, or obnoxious to the provisions of the Transfer of Property Act."

[36] In 33 ALL. 457[18] a similar conclusion was reached in the case of parties governed by the Mahomedan law. An important passage occurs in the judgment at page 462 :

"Section 6 (a), T. P. Act merely provides that 'the chance of an heir apparent succeeding to an estate or any other mere possibility of a like nature cannot be transferred.' This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any interest or growing out of any existing property. It does not for example strike at agreement by expectant heirs, such as an agreement to divide a particular property in a certain way on the happening of a particular contingency : *see* 8 Cal. 138.[19]"

The words underlined by me in the quotation apply to the situation in the present case.

[37] In I. L. R. (1939) ALL. 950[20] it was similarly held that the transfer or relinquishment for consideration of the interest of a Hindu reversioner would be void under S. 6 (a), T. P. Act as the transfer of a mere spes successionis, but such a transfer or relinquishment would be valid where it was a part and parcel of the family settlement or of a compromise in a dispute between rival claimants to property.

[38] These cases support me in the view that the impugned agreement is not a violation of the principle of any Hindu law or of S. 6 (a), T. P. Act—the agreement was one of the terms upon which the plaintiffs obtained a larger share in the properties of the family than to which they would have been entitled if the ordinary rule of law was applied. They got the possession of their respective shares thus defined and in order to secure to them and their branches for all times the properties so allotted it was also agreed that neither party would claim any right in the properties allotted to the other in case the person or persons dies or die. How can this be called a transfer of a spes successionis or an agreement to transfer or sell the reversionary right ? It is an agreement regarding an actual property in existence. It does not deal with any other property which was not the subject of partition.

[39] Mr. P. R Das in the course of an elaborate argument tried to distinguish these cases and pointed to the observations of Piggot J. in 41 ALL. 611.[21] He relied strongly on the decision of their Lordships of the Judicial Committee in the well-known cases in 27 C. L. J. 296;[4] 1 I. A. 157;[8] 18 C. W. N. 929[10] and 40 ALL. 487.[6] But I have already dealt with the principle enunciated in these cases.

[40] Mr. P. R. Das also drew attention to the decision of their Lordships of the Judicial Committee in 17 P. L. T. 636[22] which reversed the decision of this Court in 14 P. L T. 27.[23] The facts in that case are somewhat complicated, but the dispute between the parties can be clearly gathered if the pedigree given at p. 638 is kept in view. The question was the effect of the compromise entered into between Ganesh and Naurangi Lall on 6th April 1868. Their Lordships held that in 1868 the plaintiffs if any of them were born, had no interest whatever in the estate of Bajrangi Lall and even if Ganesh had been their guardian he would not have had authority to enter into any transaction with regard to the plaintiff's prospects of succeeding to Bajrangi Lal's estate. It was in this view that their Lordships made these observations, which were strongly relied on by Mr. Das at page 644 :

"Their Lordships are aware of the favour shown by the Courts to family arrangements." (Per Viscount Cave in 24 C. W. N. 105),[24] (and it is doubtless good that family disputes should be settled and that those who agree to settle should be held to their agreement. But Ganesh in the present case can have had little chance in ordinary course of surviving Amola and when he bargained away the chance of his descendants in general in order to obtain for himself an immediate share in the estate of Narain, he was making an agreement which calls for no special favour from the Courts. In 1885 Jairam may have had equally little difficulty in preferring the bird in the hand. The plaintiffs had neither right nor power to interfere with their kinsmen's choice. Unless the plaintiffs' individual conduct makes it unjust that they should have a place among Bajrangi Lal's reversioners their legal right should have effect. Their Lordships do not consider that the defendants have succeeded in showing that the compromise of 1868 or the actings of the plaintiffs or their kinsmen thereunder estop the plaintiffs from asserting that they are entitled as reversioners of Bajrangi Lal."

None of these observations apply to the facts of the present case. Here on the date of the agreement the plaintiffs had a title to the properties, though the extent of their title was disputed. They entered into immediate possession of the properties and as a result of a family arrangement all the parties agreed that they would not claim any share which would otherwise have accrued to them on the death of either of the parties in these properties. The parties did not deal with any future rights in any other property. As I said before, they were anxious that the property which was being allotted to either of the parties should never go out of that branch. I do not see anything unjust in the agreement.

[41] For these reasons I come to the conclusion that the impugned agreement is not hit by any rule of Hindu law or by the provisions of S. 6 (a), T. P. Act. No argument was advanced before us that the agreement offends any other rule of law.

[42] It now remains to consider the objection of the respondents that the impugned agreement being embodied in the compromise decree cannot be challenged so long as the compromise decree is not set aside. This view commended itself to the Subordinate Judge.

[43] The cases strongly relied upon by Mr. P. R. Das in support of his contention are (1895) 2 Ch. 273,[25] 26 Mad. 31,[26] 30 Mad. 255[27] and 31 Bom. 165,[5] and he relies upon the principle referred to by Mulla in his Commentary on the Code of Civil Procedure, 11th Edn. at p. 969 that:

"Where a decree is based on an agreement or compromise the Court must be taken to adopt the agreement with all its incidents, the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge."

On the other hand, Mr. P. L. Banerji and Dr. D. N. Mitter argued that so long as the compromise decree is not vacated by a suit, the decree retains its full force and reliance inter alia is placed upon A. I. R. 1929 P. C. 289,[28] (1896) 1 Ch. 673,[29] (1897) 2 Ch. 534,[30] at p. 547. A. I. R. 1936 Bom. 301,[31] 35 Bom. 371,[32] 47 Bom. 597[33] and many other English and Indian cases. Mr. P. L. Banerji also relied upon the provisions of S. 44, Evidence Act, which provides that any party to a suit or other proceedings can show that any judgment or decree which is relevant was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. He argues that unless the impugned decree is set aside by a proper suit, the appellants can only ignore its effect if they can show that the Subordinate Judge who passed the compromise decree was not competent to deliver it or that the decree was obtained by fraud or collusion. If it was necessary to decide the question, I would be inclined to agree with the argument of Mr. P. R. Das.

[44] The case in 26 Mad. 31[26] clearly lays down that even where the decree is based upon a compromise and there is nothing more on the part of the Court than a mere adoption of the contract, the Court must be taken to have adopted it with all its incidents, and if any terms of the contract are opposed to public policy, this will not be enforced by the Courts. In that case the executing Court was held entitled to refuse to execute the compromise decree which directed the sale of an office attched to a temple.

[45] The case in A. I. R. 1929 P. C. 289[28] relied on strongly by the respondents does not take a different view. In that case it was held that:

"An order by consent, not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order must when once it has been completed, obey it unless and until he can get it set aside in proceedings duly constituted for the purpose."

But the observations of their Lordships at p. 294 should be noticed where they dealt with the argument of the appellant that it was no answer to say that he wants to be allowed to prove that the consent order was and had been nullity and observed:

"At the best, so far as the appellant is concerned, the order embodied an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant can only be so set aside in an action or proceeding directed to that special end."

In truth, the decision of the question will depend upon the nature and character of the objection which is taken against the compromise order or decree. If the objection is that the decree or order on the face of it is a nullity, the objection must be allowed to be taken in any proceeding. But if the objection is that on proof of certain facts like mutual mistake or fraud, the consent decree is voidable, then a separate suit or proceeding must be taken to have the order or decree set aside.

[46] Mr. P. R. Das strongly relied upon the observation of Lindely L. J. in (1895) 2 Ch. 273[25] at p. 281:

"I take it that an agreement founded upon a common mistake, which mistake if impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside, and as invalid without any process or proceedings to do so."

But it will be observed that these observations were made while dealing with the effect of a consent order in a separate proceeding which was an action brought by the Banking Company

against the defendant company, the liquidator, and the plaintiffs in the decree-holders' action in which evidence was given to show that the consent of the Banking Company to the order of 1892 given under a mistake as to material facts.

[47] The effect of the decision in (1895) 2 Ch. 273[25] was expressed by Batchelor J. in 35 Bom. 371[32] at p. 378;

"That was an action brought by the Banking Company for the specific purpose of setting aside a consent order as having been obtained under a mistake as to material facts, and the Court of appeal, affirming Vaughan Williams J. set aside the order. The decision might assist the plaintiffs if they were suing to set aside the consent decree, but as we have said, that is not their suit, and the consent decree is still outstanding against them. That being so, their case upon this point is exposed to the observations of Lindley L. J. where he says; 'A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that.'"

[48] Dr. Mitter relied upon the observations of the Lord Chancellor in (1895) 1 Ch. 37[34] :

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

But this, in my opinion, would have been of help to the respondents if the question of the validity of the impugned agreement was itself the subject of dispute in the partition action and then the decree of the Court, even though based upon a compromise, would have been binding on the parties until a regular suit was instituted to set it aside upon the ground of mutual mistake, collusion or fraud. But this was not the situation here.

[49] Dr. Mitter also referred to the P. C. case in (1899) A. C. 114[35] and drew attention to the observation of Lord Hobhouse at pp. 123-124, but this observation makes a distinction which I have attempted to draw namely, if the legality of the act, which is impugned was one of the points substantially in dispute even though that may be a fair subject of compromise in Court like any other disputed matter, and where the contract on the face of it was quite regular and its infirmity depended on extraneous facts which were disclosed by nobody, there was no reason whatever why the Court should not decree that which the parties asked it to decree and such a judgment cannot be of more validity than the invalid contract on which it was founded. In the present case, the infirmity of the agreement does not depend upon the proof of any extraneous facts, but is patent on the face of it, if it is assumed that the agreement is hit by S. 6 (a), T. P. Act.

[50] Dr. Mitter also drew attention to the case in (1896) 1 Ch. 673[29] where it was held by Romer J. that a judgment taken by consent and under a mistake cannot be set aside otherwise than in a fresh action brought for the purpose unless there has been a clerical mistake or an error arising from an accidental slip or omission, or the judgment as drawn up does not correctly state what the Court actually decided and intended to decide.

[51] In (1897) 2 Ch. 534[30] the Court of appeal affirmed the judgment of Byrne J. by which a consent order was set aside made upon settled minutes in an action after the order had been passed entered and partially acted upon. Lindley L. J. pointed out at p. 550 that it was clear that the consent order being based upon and intended to carry out an agreement come to between the parties, ought to be treated as an agreement which could be properly set aside on any ground on which an agreement in the terms of the order could be set aside and that mistake was one of such grounds.

[52] It is unnecessary to multiply citation of further authorities. It is clear to me that here the appellants do not seek to set aside the consent order or the compromise decree. What they say is that the consent order or decree is no more than an agreement which is hit by the rule of law and that the validity of the agreement was never the subject-matter of dispute in the partition action.

[53] In my opinion the appellants are entitled to show that without bringing a suit to set aside the consent decree the impugned agreement though embodied in a compromise decree cannot be enforced in a Court of law.

[54] For these reasons, I am of opinion that it is open to the appellants to show that the impugned agreement and the compromise decree violate the clear provisions of S. 6 (a), T. P. Act. The question however, has become academic as I have held above that the impugned agreement does not offend the rule of S. 6 (a), T. P. Act.

[55] It is necessary to observe, as we pointed out in the course of the argument, that we do not agree with the contention of Mr. Baldeva Sahay that the impugned agreement and the compromise decree cannot be enforced as the decree or agreement was not registered. The provisions of S. 17 (2) (b) are clear and negative the contention advanced. The agreement did not relate to any immovable property which was beyond the scope of the partition suit.

[56] Before parting with this case I wish to observe that every attempt was made by the Court that the parties in this appeal should

settle their differences, but unfortunately no compromise could be arrived at between the contending decree-holders.

[57] We are indebted to the learned advocates for both sides for their interesting elaborate and able arguments with which they assisted the Court.

[58] I would dismiss the two appeals with costs. The civil revision is also dismissed but without costs.

**Mukharji J.** — I agree. There is nothing which I can usefully add.

D.S. *Appeals dismissed.*

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## A. I. R. (35) 1948 Patna 372 *[C. N. 128.]*

MANOHAR LALL AND MUKHARJI JJ.

*Bashir Mohammad Khan — Appellant* v. *Md. Kabir Ahmad Khan and others—Respondents.*

Privy Council Appeal No. 21 of 1946, Decided on 9-4-1947.

Civil P. C. (1908), S. 110, para 2 — Suit for plaintiff's share of dower — Amount of dower alleged to be Rs. 40,000 — Other claimants to dower made defendants—Suit dismissed—High Court on appeal giving decree for less than Rs. 10,000—Defendant applying for leave to appeal — Requirements of S. 110 held were satisfied.

*P* who was one of the heirs of a deceased Muhammadan lady brought a suit against *D* to recover his share of the dower due to the lady which he alleged to be Rs. 40,000. The other heirs of the lady who were also entitled to share the amount were made pro forma defendants. The trial Court dismissed the suit. The decree was reversed by the High Court in appeal and a decree in favour of the plaintiff was passed for Rs. 6666 on account of his share of the dower which was found to be Rs. 40,000. *D* applied for leave to appeal to the Privy Council:

*Held*, that the decree directly or indirectly involved a claim or question to or respecting property of above Rs. 10,000 and *D* was entitled to the certificate that the requirements of S. 110 were satisfied : 50 C. W. N. 255, *Foll*; *Case law Ref.* [Paras 13, 14]

Annotation : ('44-Com.) C. P. C., S. 110, N. 11.

*Cases referred* :—

1. ('06) 33 Cal. 1286, Dalgleish v. Damodar Narain.
2. ('13) 35 All. 445 : 21 I. C. 617, Sri Kishan Lal v. Kashmiro.
3. ('33) 54 All. 858 : 20 A.I.R. 1933 All. 177 : 138 I.C. 670, Mahomed Ashgar v. Mt. Abida Begum.
4. ('16) 39 Mad. 843 : 3 A.I R. 1916 Mad. 985 : 31 I.C. 296, Subramania Ayyar v. Sellammal.
5. (19) 4 Pat. L. J. 415 : 6 A.I.R. 1919 Pat. 305 : 52 I.C. 723, Bhaunath Gir v. Bihari Lal.
6. ('16) 43 I. A. 187 : 3 A.I.R. 1916 P. C. 18 : 38 All. 488: 35 I.C. 939 (P.C.), Radha Kunwar v. Reoti Singh.
7. ('05) 6 Bom. L. R. 403, De Silva v. De Silva.
8. ('20) 44 Bom. 104: 7 A.I.R. 1920 Bom. 418: 55 I.C. 972, Raoji Bhikaji v. Laxmibai Anant.
9. ('25) 49 Bom. 149 : 12 A. I. R. 1925 Bom. 137 : 85 I.C. 191, Nariman Rustomji Mehta v. Hasham Ismayal.
10. ('30) 57 I. A. 56: 17 A.I.R. 1930 P. C. 44: 53 Mad. 167 : 121 I. C. 513 (P.C.), Mangamma v. Mahalakshmamma.
11. ('31) 35 C. W. N. 33 : 18 A.I.R. 1931 P. C. 22 : 10 Pat. 86 : 57 I. A. 279 : 130 I.C. 612 (P. C.), Mukhlal Singh v. Kishuni Singh.
12. ('32) 59 I. A. 29 : 19 A.I.R. 1932 P. C. 28 : 59 Cal. 1012 : 136 I. C. 398 (P. C.), Jogesh Chandra Roy v. Emdad Meah.
13. ('44) 71 I. A. 142 : 31 A.I.R. 1944 P. C. 65: I.L.R: (1944) Bom. 745 : I. L. R. (1944) Kar. (P. C.), 235 : 219 I.C. 225 (P.C.), Shevantibai v. Janardhan Raghunath.
14. ('20) 42 All. 445 : 7 A.I.R. 1920 All. 202 : 55 I. C. 976, Ram Kumar v. Mahomed Yakub.
15. ('33) 56 Mad. 886 : 20 A.I.R. 1933 Mad. 401 : 143 I. C. 139, Venkatathirisami Naidu v. Kasthuriranga Appaswami Naidu.
16. ('34) 12 Rang. 164 : 21 A.I.R. 1934 Rang. 65 : 149 I. C. 1033, Dawsons Bank Ltd. v. Nippon Menkwa Kobushiki Kaisha.
17. ('46) 50 C. W. N. 255, Nural Abbas v. Haripada Biswas.
18. ('39) 43 C.W.N. 432, Khajeh Sayedulla V. K. Habibullah.
19. ('21) 2 P. L. T. 340 : 60 I. C. 523, Mathura Prasad Singh v. Ram Prasad Tewari.

*A. C. Sinha and Shamsul Huda* — for Appellant.

*S. A. Saghir* — for Respondents.

**Manohar Lall J.**—This is an application by the principal defendant, Bashir Mohammad Khan, for leave to appeal to His Majesty in Council from a decision of this Court which reversed the decision of the Subordinate Judge in a suit instituted for recovery of the plaintiff's share in a dower which he alleged to be Rupees 40,000 and one gold dinar due to the deceased, Mt. Bibi Hamidan. Zahir Ahmad Khan and Monir Ahmad Khan, brothers of the plaintiff, were also made pro forma defendants in the suit on the allegation that although they were to have joined in the suit, they refused to join as they could not arrange for the court-fees and they would institute a suit hereafter. The appellant's case was that the dower debt was only Rs. 500 and further that the suit of the plaintiff was barred by limitation.

[2] The learned Subordinate Judge came to the conclusion that the evidence of the witnesses of the plaintiff was unsatisfactory to prove that the dower fixed was Rs. 40,000 and one gold mohur. He also held that the dower debt must be assumed in this case to be prompt in part and deferred as to the other part and as Mt. Bibi Hamidan must have made a demand for the payment of the prompt portion of the share soon after the difference with her husband, which took place long before the institution of the suit, the plaintiff was not entitled to any decree.

[3] This decision was reversed by this Court on the finding that the dower fixed was Rs. 40,000 and a gold mohur and that there was no satisfactory evidence that a part of the dower was prompt. The result was that a decree was passed in favour of the plaintiff for Rs. 6666-8-8 on account of his admitted share in the dower of the deceased, Mt. Bibi Hamidan.

[4] The defendant submits that the judgment of the High Court being a judgment of reversal and the decree directly or indirectly involving a claim or question to or respecting property of about Rs. 10,000 he is entitled to a certificate as a matter of right. He also urges that the decision of High Court has the effect of estopping the appellant by the rule of res judicata from agitating the same question in respect of the amount of their share in the dower which will be payable to the pro forma defendants when they will institute their suit. It is further urged that it is immaterial that in the present suit the pro forma defendants did not lay any claim to their share in the dower, and as a matter of fact those defendants have now instituted a suit for recovery of their share of the dower.

[5] On behalf of the respondent it was urged that as the decree which has been passed in favour of the plaintiff is for a sum below Rs. 10,000, the value of the claim or question in the present case cannot, by any stretch of reasoning, be held to be above Rs. 10,000.

[6] A number of cases were cited at the Bar, and I have examined a large number of cases which have clustered round this difficult question.

[7] Speaking generally the authorities on the construction of this section can be placed under two broad heads: (1) in which it has been held that the final decree or order is appealable if the value of the property to which the claim or question relates and the rights in which are affected by the decision on such claim or question is Rs. 10,000 or upwards, whether or not loss or detriment to the value of Rs. 10,000 has accrued to the applicant as a result of the decree or order that has been passed: see amongst others 33 Cal. 1286,[1] 35 ALL. 445[2] and 54 ALL. 858.[3] (2) Case in which it has been held that under S. 110, Civil P. C., it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal no appeal lies under S. 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs 10,000, or upwards. The leading case is 39 Mad. 843[4] followed in this Court in 4 Pat. L. J. 415.[5] Reference may also be made to 43 I. A. 187,[6] 6 Bom. L. R. 403,[7] 44 Bom. 105[8] and 49 Bom. 149.[9] Their Lordships of the Judicial Committee have approved the *ratio decidendi* of the Madras case in 39 Mad. 843[4] in 57 I. A. 56;[10] 35 C. W. N. 83[11] and 59 I. A. 29.[12]

[8] In a recent decision of their Lordships in 71 I. A. 142[13] a large number of these cases were again noticed by their Lordships. In this case the plaintiff's suit for partition of joint family property was dismissed by the Courts below on the ground of limitation. Their Lordships held that the value of the subject-matter in dispute on appeal to His Majesty in Council must be taken to be the value of the share of the joint family property in respect of which the appellant was claiming, and further that the question as to the title of the plaintiff to the share which was claimed in the joint family property did not become a question respecting the whole of the joint family property merely because if her title was established it would result in the joint family estate being partitioned.

[9] It will be noticed that in the last Privy Council case the appellant to His Majesty in Council was the plaintiff. It is obvious that different considerations would arise where the applicant for leave to appeal to His Majesty in Council is the defendant : *see* 42 ALL. 445,[14] 56 Mad. 886[15] and the observations of Page C. J. in 12 Rang. 164.[16] The question is not free from difficulty as has been pointed out in a recent decision of the Calcutta High Court in 50 C.W.N. 255,[17] which comes nearest to the situation in the present case. In that case a common manager of an estate was appointed under S. 95, Bengal Tenancy Act. The purchaser of a four-anna share in the Estate instituted a suit against the common manager to which all the co-sharers were made parties for recovery of possession of his share after a declaration that the common manager was illegally appointed. The suit was decreed by the Subordinate Judge but was dismissed by the District Judge. On second appeal to the High Court, the decision of the Subordinate Judge was restored, and it was held that the appointment of the common manager was illegal. It was admitted that the value of the subject-matter of the suit namely the right of the manager to the four annas-share, was only Rs. 2900 although it was stated in the plaint that the value of the share of the plaintiff was Rs. 10,020. The defendant asked for leave to appeal to His Majesty in Council. The learned Judges after examining some of the cases to which I have referred came to the conclusion that the effect of the judgment of the High Court was that the appellant could no longer manage as common manager any share or any of the 17 items of property of which the value was undoubtedly more than Rs. 10,000. They also pointed out that the co-sharers of the plaintiff in the properties which he claimed and all the proprietors of the remaining fifteen items of property of the estate were all parties to the suit and were also parties to the appli-

cation and that they could on the basis of that judgment ask the appellant to walk out and observed :

"If the appellant succeeds before Judicial Committee of the Privy Council the claim of Haripada Biswas as also of those remaining owners of the Khanpore Estate to manage their property in khas would be negatived. Their shares are outside the subject-matter of the suit, which relate to Gopinath's share only, but the judgment of this Court directly involves the question of the management of their shares also. We accordingly hold that the case comes within the second paragraph of S. 110."

[10] The respondent, on the other hand, relies upon the case in 43 C. W. N. 432.[18] In that case some of the heirs of a deceased person instituted a suit for payment of their shares of the monthly allowance on the allegation that the allowance due to all the heirs was Rs. 187 per month but that the share due to the plaintiffs was Rs. 33-2-0 and they valued their suit at Rs. 5300 which was also the value of the appeal to the High Court. The suit was dismissed by the Courts below and the plaintiffs then applied for leave to appeal to the Privy Council on the footing that the capitalised value of the total amount of the allowance due according to their allegation to all the heirs was over Rs. 10,000, but those heirs never put forward any claim. It was held that although the other heirs were parties to the suit, the decision did not involve directly or indirectly their interests and the applicants were not entitled under the second paragraph of S. 110, Civil P. C., to fall back upon the value of anything beyond their own share. It will be observed that in this case the plaintiff was the appellant and not the defendant, and, therefore, this decision does not run counter to the case in 50 C. W. N. 255.[17]

[11] The respondent also relied upon the case of this Court in 2 Pat. L. T. 340.[19] In that case the plaintiff sued upon a mortgage bond of which the total amount at the date of the plaint was Rs. 8622, and if the plaintiff had succeeded the amount on the date of the decree would have been over Rs. 10,000. But the suit was dismissed. The plaintiff appealed to the High Court and his appeal succeeded and he got a decree of over Rs. 10,000 up to the date of the decree of the High Court. The defendant applied for leave to appeal to His Majesty in Council and it was contended on behalf of the plaintiff that the amount or value of the subject-matter of the suit in the Court of first instance was not Rs. 10,000 or upwards, but this argument was negatived by the learned Chief Justice in these words :

"I am unable to accept this view. I think that the proper construction to be placed upon that section in so far as it relates to the amount or value of the subject-matter of the suit, must be taken to be the amount or value which the plaintiff either obtained or, had he been successful, would have obtained in this suit at the date when the decree was passed."

I do not see how this case helps the respondents.

[12] Having given my most anxious consideration to this question, which is not free from difficulty, I am on the whole of opinion that in this case I should follow the view taken by the Calcutta High Court in 50 C. W. N. 255,[17] and grant the certificates as asked for. The question being a question of difficulty, it induces me to grant the certificate so that their Lordships may decide this question authoritatively for the guidance of the High Courts in India.

[13] The result is that the applicant will be granted a certificate that the requirements of S. 110, Civil P. C., are satisfied. Each party will bear his own costs in this Court.

**Mukharji J.** — I agree.

S.C. *Application allowed.*

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## A. I. R. (35) 1948 Patna 374 *[C. N. 129.]*

DAS AND RAY JJ.

*Salihuddin Ahmad — Appellant* v. *Mohiuddin Ahmad and others—Respondents.*

A. F. O. O. Nos. 269 & 335, of 1946 and 92 of 1947, Decided on 8-8-1947, from order of Addl. Dist. Judge, Arrah, D/-10-8-1946 and 14-2-1947, respectvely.

**Muhammadan law — Wakf — Mutawalli — *De facto* —He cannot be removed by District Judge, in summary proceeding — Such order if passed is revisable—Civil P. C. (1908), Ss. 92 and 115.**

A District Judge has no power to remove a *de facto* Mutwalli and to appoint a receiver in a summary proceeding when there is no suit before him under S. 92, Civil P. C., or under the provisions of Religious Endowments Act: 27 A. I. R. 1940 Pat. 9 and 25 A.I.R. 1938 Pat. 537, *Rel. on*; 3 A. I. R. 1916 P. C. 132 and 21 A. I. R. 1934 Pat. 443, *Ref.* [Para 5]

Such an order if passed is without jurisdiction and is revisable. [Para 9]

Annotation : ('44-Com ) Civil P. C. S. 115 N. 10.

*Cases referred*:—

1. ('34) 21 A. I. R. 1934 Pat. 443 : 153 I. C. 557, Najihuddin Ahmad v. Amir Hasan Khan.
2. ('16) 43 I. A. 127 : 3 A. I. R. 1916 P. C. 132 : 43 Cal. 1085:35 I. C. 30 (P.C.), Mohamed Ismail Ariff v. Ahmed Molla.
3. ('39) 18 Pat. 417 : 27 A. I. R. 1940 Pat. 9 : 186 I. C. 28, Bibi Zohra v. Bibi Habibunnissa.
4. ('38) 19 P. L. T. 934 : 25 A. I. R. 1938 Pat. 537 : 178 I. C. 813, Mahomed Yusuf v. Mohamed Ayub
5. ('06) 33 Cal. 789, Budree Das v. Chooni Lal.

*In No. 269 of 1946 and 92 of 1947*:

*B. C. De, A. H. Fakhruddin, M. Rahman and A. N. Chatterji*—for Appellant.

*Sarjoo Pd. and S. Anwar Ahmad*— for Respondents.

*In No. 335 of 1946*:

*Sarjoo Pd. and S. Anwar Ahmad* — for Appellant.

*B. C. De, A. .H. Fakhruddin, M. Rahman and A. N. Chatterji*—for Respondents.

**Das J.** — These three miscellaneous appeals arise out of the same orders, and have been heard together. In Miscellaneous Appeals Nos.

269 of 1946 and 92 of 1947, the appellant is Shah Saliuddin, and in Miscellaneous Appeal No. 335 of 1946 the appellant is Shah Mohiuddin. They are brother and minor son respectively of one Shah Najiuddin, who was Sajjadanashin and Mutwalli of the well-known endowment of the Sasaram Khanqah, and died on 14-4-1946. The two appeals of Shah Saliuddin are directed against two orders of the learned Additional District Judge of Arrah, one dated 10-8-1946, directing the appointment of a receiver to take possession of the Khanqah properties and the other dated 14-2-1947, by which one Ghulam Fakhruddin, a senior pleader of Arrah, has been appointed as such receiver. The appeal of Shah Mohiuddin, who is the principal respondent in the other two appeals, is also against the order of the learned Additional District Judge directing the appointment of a receiver. But Mr. Sarjoo Prasad, appearing for the appellant in Shah Mohiuddin's appeal, has not pressed his appeal; on the contrary, he has supported the order complained against, as respondent in Shah Saliuddin's appeals.

[2] The point raised in Shah Saliuddin's appeals is a short one, viz., if the learned District Judge had jurisdiction to appoint a receiver in a summary proceeding, when no suit under S. 92, Civil P. C. or under the provisions of the Religious Endowments Act had been instituted before him and when the effect of the appointment of such a receiver was the removal of a Mutawalli, holding office *de jure* or *de facto*. Though the point is a short one and can be answered without much difficulty when presented in the form stated above, a long story has to be told in order to appreciate the point and the arguments raised round it.

[3] The Sasaram Khanqah has been the subject of much litigation from time to time, which has often come up to this Court. The last litigation which came up to this Court resulted in the decision in A. I. R. 1934 Pat. 443,[1] where some of the history of the Khanqah is given. The endowment in question consists principally of two Imperial grants, one of 1717 from the Emperor Farrukh Siyar, and the other of 1762 from the Emperor Shah Alam, the first for purely religious purposes and the second for charitable purposes of a secular character. The founder of the Khanqah was Shah Kabir Darvesh, who was the first Sajjadanashin Mutwalli. For our purpose, we may skip over the history till we come to 1926 in which year ten Muhammadan inhabitants of Sasaram instituted a title suit under S. 92, Civil P. C. for the removal of Shah Maliuddin, who was the 10th Sajjadanashin Mutwalli, on grounds of unfitness, misfeasance and malfeasance, and also for the framing of a scheme for the management and administration of the Khanqah properties. This suit was decreed, and Shah Malihuddin was held to be unfit to hold the office, and a scheme was ordered to be prepared and a fit person appointed as Sajjadanashin Mutwalli. There was an appeal to this Court, reference to which has already been made. During the pendency of the appeal Shah Malihuddin died, and his eldest son Shah Najihuddin was substituted and continued the appeal, which except for slight modifications of the decree was substantially dismissed. A scheme of management was then prepared, and in pursuance of the directions given by this Court Shah Najihuddin was appointed Sajjadanashin and Mutwalli out of fourteen candidates for the office. I need not encumber this recital of past history by giving details of the scheme—material clauses of which I shall refer to in due course, nor need I go into the question of the custom or usage which governs the succession to the office of Sajjadanahsin and Mutwalli in this Khanqah, a question which does not really require decision at this stage. I need only state that the learned District Judge has rightly pointed out that the scheme does not contain any provision for the appointment of a Mutwalli Sajjadanashin when the office falls vacant. Shah Najihuddin, appointed in 1937, died on 14-4-1946. On 17th April, the District Judge received wire from Shah Salihuddin, younger brother of Shah Najihuddin, that he had assumed the office of Sajjadanashin Mutwalli according to old established custom. This was followed by a regular petition to the same effect, filed on 2nd May 1946. On the same date, the widow of Shah Najihuddin sent a telegram saying that the late Sajjadanashin had nominated his minor son Shah Mohiuddin as his successor. The learned District Judge broached the question of appointing a Receiver on 4th May 1946—to which Shah Salihuddin raised objections on the ground that he had already taken charge of the office. On 18th May 1946 a petition was put in on behalf of the minor son Shah Mohiuddin, whose claim was supported by another younger brother of the late Sajjadanashin. Petitions and counter petitions continued to be filed in this manner till the learned District Judge heard the receivership matter and passed his order dated 10th August 1946, by which he ordered the appointment of a Receiver. On 14th August 1946 Shah Salihuddin was appointed ad interim Receiver, on the ground that he was in possession of the estate. This appointment was subject to the qualification, expressly mentioned in the order, that it would not prejudice his right to appeal against the order directing the appointment of a Receiver. Applications for the appointment of a

Receiver were then called for, and on 14th February 1947 Ghulam Fakhuruddin, a senior pleader of Arrah, was appointed Receiver.

[4] Now, the first question requiring determination in these appeals is if Shah Salihuddin had already taken possession of the office of Sajjadanashin Mutwalli and the properties of the Khanqah, before the order dated 10th August 1947. The contention of Shah Salihuddin (hereafter referred to as the appellant) is that he had —whether rightfully or not need not be considered now. The contention of Shah Mohiuddin (hereinafter referred to as the respondent) is that he had not, and that the property was *in medio*, i. e., in the enjoyment of no one, till the District Judge made his order for the appointment of a Receiver. This question is of some importance in view of the arguments presented before us. Let us see how the District Judge has himself dealt with this question. In the order complained against the District Judge has referred to the various act of possession alleged on behalf of the appellant—(a) the issue of *parwanas* arranging for the allowances to be paid to the members of the Sajjadanashin's family; (b) issue of *parwanas* to tahsildars for the management of the estate; (c) the appointment of Mr. Mehdi Hassan as Manager; (d) substitution of the appellant in place of the deceased Sajjadanashin in some rent suits; (e) the obtaining of a decree in a money suit as Sajjadanashin; (f) payment of Government revenue and rent; (g) payment of municipal dues, etc. The learned District Judge has further found that Mr. Mehdi Hassan, the Manager of the estate, has accepted the appellant as Sajjadanashin and is working under him, though he has criticised this action of the Manager. After referring to the various acts of possession the learned District Judge has expressed himself as follows :

"It could not be doubted that this intermeddling with the property could not and would not convey valid title to the appellant unless it is found as a matter of fact that he has good title to the office of Sajjadanashin Mutwalli."

This shows that the learned District Judge himself was of opinion that the appellant was acting as *de facto* Sajjadanashin Mutwalli. The position is made still more clear in subsequent orders of the learned District Judge. In the order dated 14th August 1946, by which the appellant was appointed ad interim Receiver, it was observed as follows :

"There are indications on the record that Syed Shah Salihuddin is in possession of the estate and some of the local bodies have even been dealing with him as such. To appoint any other ad-interim Receiver at this stage would mean taking over charge of the estate to day and making over charge of the same to the permanent Receiver after sometime."

Then, in the order dated 14th February 1947, it was observed that the appellant had in fact taken possession of the office and had remained in possession for sometime in that capacity without having obtained any order of the Court. It seems clear, therefore, that the learned District Judge was himself of the opinion that the appellant had taken possession of the office and the properties of the estate. A trustee may be such *de jure* or *de facto*, a person who without title chooses to take upon himself the character of a trustee becomes a trustee *de son tort*.

[5] Having found that the appellant was acting as Sajjadanashin Mutwalli, the District Judge had a very simple problem before him, namely, if he could remove such a trustee and appoint a Receiver in a summary proceeding. In my opinion, the learned District Judge was in error in thinking that he could remove such a trustee in a summary proceeding and appoint a Receiver, when there was no suit before him under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act. The effect of the appointment of a Receiver in such circumstances is the virtual removal of a trustee who is acting as such, *de jure* or *de facto*. The reason which the learned District Judge has given for the appointment of a Receiver can be best expressed in his own words. Dealing with the contention of the appellant that the learned District Judge had no right to appoint a Sajjadanashin in the circumstances mentioned above, the learned District Judge stated as follows :

"If this were to be accepted, the result would be that the Court would entrust the management of the properties carrying an income of several thousands a year to a man whose title to the office has not been found to be proved and which is liable to be lost if any one of the other claimants runs to a Court of competent jurisdiction and gets his title to the office adjudicated by it."

This reason is untenable, because it is not a case of entrusting the management of the properties by the Court, but is a case of removing a person who is already acting as a trustee. The question before the learned District Judge was if he had such power in the absence of a suit under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act. This question has been considered in two decisions of this Court, with particular reference to the powers of the District Judge as Kazi under the Mahomedan law. One of the points which has been urged before us on behalf of the respondents is that the District Judge as Kazi was entitled to appoint a Mutwalli, and reliance was placed on the observations made in 43 I. A. 127,[2] the observations being at page 134 of the report :

"The Mussulman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian

system is taken by the civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public, religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion."

In 18 Pat. 417[3] the point has been considered at great length with reference to earlier authorities on the question, and the conclusions arrived at on a consideration of the earlier authorities have been expressed as follows :

"It may be said on these authorities that there is practically a consensus of opinion that when there is a vacancy in the office of a Mutwalli the District Judge in his discretion may nominate a Mutwalli but that he has no power in a summary proceeding to appoint another Mutwalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under S. 92, Civil P. C. When, however, two persons claim to be the Mutwalli, the dispute beween them is one of a civil nature and must be decided in an ordinary civil suit : the vindication of individual rights is not a matter for decision either under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act."

If I may say so with respect, I agree entirely with the conclusions expressed above. There can be no doubt that the appellant was the *de facto* Mutwalli, though he may be no more than a trustee *de son tort* The District Judge had no jurisdiction in a summary proceeding to remove him from office or to interfere with his possession. The same view has been expressed in 19 P. L. T. 934[4] where it has been observed that the District Judge has no general power to remove a mutwalli in miscellaneous proceedings his powers in this respect being limited and denied by Ss. 18 and 14, Religious Endowments Act, 1863, and S. 92, Civil P. C. The District Judge has, no doubt, power in proper circumstances to make an appointment to fill a vacancy when an office of this kind has fallen vacant. Learned counsel for the respondents has very strenuously contended before us that the property was *in medio* and the office had fallen vacant: therefore the District Judge as the Kazi had power to fill the vacancy. The District Judge did not, however, base his decision on this ground; he found that the appellant had been acting as mutwalli without the order of the Court and he removed him not because the property was *in medio* but because he thought that he had not established his title as *de jure* mutwalli. That there was no suit under S. 92, Civil P. C., before the learned District Judge is also sufficiently clear. As has been explained in 33 Cal. 789,[5] (*see* the observations at p. 807), S. 92, Civil P. C., contemplates a representative suit, that is, a suit which is prosecuted by individuals not for their own interests but as representatives of the general public in order to secure a proper administration of a public trust. Suits brought not to vindicate or establish the rights of the public in respect of a public trust, but to remedy an infringement of an individual right or to vindicate a private right do not fall within the section. An instance of a suit for the enforcement of personal, individual rights is one between two persons for determination as to which of them is the lawful trustee or mutawalli over wakf property. In the case before the learned District Judge there were three rival claimants each one of whom claimed to be the lawful trustee. It has been stated by Mr. Sarjoo Prasad on behalf of the respondent that his client has already brought a regular suit before the Subordinate Judge for a declaration of his title as mutwalli. It is clear, therefore, that there was no suit pending before the learned District Judge under S. 92, Civil P. C.

[6] Then there is the question if the learned District Judge had power under the scheme already framed under the previous suit under S. 92, Civil P. C., to make an appointment of a mutwalli in circumstances similar to the present case. I have already stated that the scheme does not contain any provision for the appointment of a mutwalli when the office falls vacant. In cases of misfeasance or malfeasance the District Judge has authority under the scheme to appoint a manager, answerable to him, for the purpose of managing the Farukhiyari properties as also the Alamshahi properties. Clauses 5 and 11 of the scheme give this power of appointing managers to the District Judge. Then there is Cl. 17 which reads as follows: "The District Judge will have a general power of control over the management of the Alamshahi and Farukhiyari properties and trust." It has been contended before us that this general power of control over the management gives the District Judge power to appoint a mutwalli also. I must make it clear that there is no allegation of mismanagement or breach of trust against the appellant. A *de facto* trustee is liable to account for what he has done and received in so acting and cannot be heard to say for his own benefit that he had no right to act as trustee. The learned District Judge is, therefore, entitled to exercise such control over the management of the properties as the scheme gives him. Control over the management of the properties can by no stretch of reasoning be held to include the power to remove a mutwalli from office and appoint a Receiver in his place. The question whether the scheme should contain a provision for the complete removal of a mutwalli in a summary way was considered in the appeal which was preferred to this Court from the decree in S 92, Civil P. C., suit

in respect of this very Khanquah (*see* the observations at p. 457 in A. I. R. 1934 Pat. 443.[1]) It was observed that it was not necessary in the present case to provide for the complete removal of mutwalli in a summary way, a suit under section being still open to the public interested. A reference has been made before us to certain Madras decisions in which the view has been expressed that such a clause in the scheme would be ultra vires. It is unnecessary to consider those decisions because the question does not arise in the present case. Moreover, the Madras view has not found favour with this Court. It is sufficient to state that under the scheme there is no power in the District Judge to remove a mutwalli or to appoint one, though the District Judge can appoint a manager for both kinds of properties in certain contingencies and has a general power of control over the management of the Alamshahi and Faruksiyari properties. I do not think that the orders complained of in this case can be supported by a reference to the scheme.

[7] The position, therefore, comes to this. The District Judge had no power to remove a *de facto* mutwalli in a summary proceeding when there was no suit before him under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act. He had no such power of removal as Kazi or under the scheme framed in the previous suit under S. 92, Civil P. C. The order of the learned District Judge dated 10-8-1946 directing the appointment of a Receiver and the further order dated 14-2-1947, appointing a particular person as receiver were both without jurisdiction and in excess of the powers of the learned District Judge.

[8] It must be made clear that I should not be understood to have expressed any opinion on the propriety of appointing a Receiver in future if and when such a request is made in the suit, which Mr. Sarjoo Prasad on behalf of the respondent says has already been filed on behalf of his client.

[9] There are two other points which require mention. On behalf of the respondent it was contended that the appellant having already accepted the position of ad interim Receiver it was not open to him to complain against the order directing the appointment of a Receiver. I have already referred to Order No. 278 dated 14-8-1946, by which the appellant was appointed ad interim receiver. That order made it perfectly clear that the appointment of the appellant as ad interim receiver would not prejudice him in any way with regard to his right to appeal against the order directing the appointment of a Receiver. The appellant had all along taken the position that he was the rightful mutwalli who had already taken charge of the office and he could not be removed by the appointment of receiver. There is, therefore, nothing in the contention that the appellant having accepted the position of an ad interim Receiver was not entitled to challenge the orders. Another contention raised on behalf of the respondent is that no appeal lies against the orders complained of. The learned District Judge purported to make the orders under O. 40, R. 1, Civil P. C., and an appeal lies under O. 43, R. 1, Cl. (s). When the District Judge appoints a mutwalli in a summary proceeding under his general powers as a Kazi, no appeal lies. But the order will be subject to revision if the District Judge had no jurisdiction to pass the orders which he did. It is open to us to treat the memoranda of appeals as applications in revision and it would be our duty to interfere with the orders which were passed without jurisdiction. There is, therefore, no substance in this objection raised on behalf of the respondent. Even under O. 40, R. 1, Civil P. C., the power of the Court to appoint a Receiver is subject to the prerequisite condition that it must appear to the Court to be "just and convenient" to make the appointment. Those words do not mean that the Court is to appoint a Receiver simply because the Court or one of the parties to the proceeding thinks it to be convenient; they mean that the Court should appoint a Receiver for the protection of rights or for the prevention of injuries, according to legal principles. If the property was shown to be *in medio*, the Court could appoint a Receiver to prevent a scramble which would be detrimental to the interests of the estate. The learned District Judge proceeded, however, on the footing that the appellant was acting as *de facto* mutwalli and he proceeded to remove him in a summary way without any allegation of mismanagement or breach of trust. It cannot be said that the appointment of a Receiver in such circumstances was just and convenient.

[10] For the reasons given above I would allow the two appeals of Shah Salihudin with costs. The two orders of the learned Additional District Judge, one directing the appointment of a Receiver and the other appointing Gulam Fakhruddin as Receiver are both set aside. The appeal of the respondent Shah Mohiuddin, which was not pressed, is dismissed.

**Ray J.** — I agree.

R. G. D. *Order acoordingly.*

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**A. I. R. (35) 1948 Patna 378** *[C. N. 130.]*

DAS AND RAY JJ.

*Jugeshwar Mahton — Appellant* v. *M & S. M. Railway and others — Respondents.*

A. F. A. D. No. 1215 of 1945, Decided on 23-7-1947, from decision of Addl. District Judge, Darbhanga, D/- 4-6-1945.

**Railways Act (1890), S. 56 — Unclaimed perishable goods sold by Railway Company — Suit by consignor against company for damages—Company held protected under S. 56 — Rules under S. 47, held not infringed.**

**Some bags of perishable goods (garlic) which were lying unclaimed were sold by auction by the Railway Company after making due enquiry as to whether the consignor wished to claim them. The consignor brought a suit against the Railway Company claiming certain amount as the price of the goods and damages:**

***Held*, that the Railway Company was protected under S. 56 and there had been no breach of the rules made under S. 47. The Company was not therefore liable.**

[Para 4]

*Dr. D. N. Mitter, Rai T. N. Sahai and B. P. Singh* —for Appellant.

*S. N. Bose and P. K. Bose* — for Respondents.

**Das J.**—This is a second appeal by the plaintiff from a decision of the learned Additional District Judge of Darbhanga, dated 4-6-1945, whereby the learned District Judge has reversed the decision of the learned Munsif of Samastipur with regard to the plaintiff's claim against one of the defendants, namely, the Madras and Southern Mahratta Railway Company and modified the decree as against the other defendant, namely, Messrs. K. A. G. Naraina Chetty and sons (hearafter to be called the Chetty for the sake of brevity). The plaintiff had brought the suit claiming a sum of Rs. 1956-6-5 as the price of 189 bags of garlic plus a sum of Rs. 500 as damages. The plaintiff is the proprietor of a firm styled Bhagwal Mahton and Jugeshwar Mahton in the town of Rosera within the Samastipur subdivision. On 21-6-1942, the plaintiff had received a telegraphic money order from the Chettys for a sum of Rs. 200 only for purchasing garlic and for despatch of the same to two places named Guntur and Bangalore. On receipt of the telegraphic money order, the plaintiff purchased the required quantity of garlic, but was unable to despatch the same to Guntur and Bangalore as booking for those stations was closed at the time. The plaintiff thereupon wrote to the Chettys intimating to them that the garlic could not be despatched to Bangalore or Guntur and enquired if it could be sent to Hindupur, another place in the Madras Presidency where the Chettys resided and carried on their business. On receipt of a reply from the Chettys, the plaintiffs sent 189 bags of garlic in two wagons on 13-7-1942. The consignor of the garlic was stated to be one Chulhai Naik, who, however, had nothing to do with the plaintiff's firm. The name of Chulhai Naik was given as the consignor, because the wagons in which the garlic was loaded were allotted in the name of Chulhai Naik. The consignee of the goods was mentioned as Bhagwan Mahton and Jugeshwar Mahton. The railway receipt along with the invoice was sent to the Chettys through the Imperial Bank of Bangalore. The goods were received at Hindupur Railway Station on the 1-8-1942. On the next day, that is, 2-8-1942, the plaintiff received a telegram from the Chettys to the effect that the garlic was not of the required quality and, therefore, the Chettys were not prepared to take delivery of the same. The plaintiff does not appear to have done anything further, on receipt of the said telegram from the Chettys. The officers of the Madras and Southern Mahratta Railway Company found that nobody claimed the consignment in question. They sent telegraphic enquiries to the Station Master of Rosera to find out if consignor wished to claim the goods. These telegraphic enquiries did not, however, bear any fruit. Due to the civil disturbances which took place in the month of August 1942, the telegrams which the railway officers sent to Rosera and Samastipur did not reach those places till sometime in September 1942. After waiting for sometime, the railway company sold the 189 bags of garlic by auction on 9-9-1942. A sum of Rs. 1000 only was realised as the sale proceeds of the garlic. There was then some correspondence between the plaintiff and the railway company, the latter offering to the former a sum of Rs. 181 and odd annas only as being the surplus sale proceeds in favour of the owner of the goods, exclusive of wharfage charges which the railway company said that they were entitled to get. Thereafter, the plaintiff brought the present suit against the Chettys and the railway company. It was alleged that they had been guilty of illegal conversion of the goods and were, therefore, liable to reimburse the plaintiff for the loss sustained. The plaintiff wanted a joint decree against both the railway Company and the Chettys.

[2] The learned Munsif who tried the suit in the first instance gave a decree to the plaintiff both against the railway company and the Chettys for the total sum claimed by the plaintiff including damages. Then, there was an appeal to the learned District Judge and the learned Additional District Judge who heard the appeal came to the finding that the railway company was not liable at all and that the Chettys were liable not to the extent claimed by the plaintiff, but to a lesser extent. The learned Additional District Judge deducted from the price of the garlic the sum of Rs. 200 which had already been sent by the Chettys by means of the telegraphic money order referred to above. He also deducted from the price certain small amounts which the plaintiff had charged on account of "gosala", "thakurbari", etc. The learned Additional District Judge found that these items did not properly form part of the price of garlic and could not be charged by way of business custom or usage. He further deducted the sum of Rs. 181-5-0 which represent-

ed the surplus sale proceeds and was lying with the railway company. The learned District Judge accordingly gave a modified decree to the plaintiff.

[3] Dr. D. N. Mitter appearing for the appellant has contended before us that the finding of the learned Additional District Judge regarding the liability of the railway company is wrong and that the railway company is liable to reimburse the plaintiff for the loss that he had sustained. The question raised on behalf of the appellant has to be considered with reference to certain sections of the Railways Act under which the railway company claimed protection in the present case. It will also be necessary to refer to certain rules made under S. 47, Railways Act. But before I do so, it is necessary to clear the ground by stating the findings of fact which have been arrived at by the final Court of fact. One of the questions which is important in the present case is if the goods in question were perishable or not. Different legal consequences will arise according as the goods were perishable or not. The learned Munsif had found that the goods were not perishable, because the railway company had not sold the garlic at once or within 24 hours. He held that the railway company had treated the goods as not perishable and, therefore, the protection which the railway company could claim was such protection as was available to the railway company in respect of the goods which are not perishable. The learned Additional District Judge has, however, come to the finding that the goods were in fact perishable, the railway company was entitled to such protection as was available to them in respect of perishable goods. The learned Additional District Judge has carefully considered the evidence in the record and has come to the finding that the evidence shows beyond any doubt that the garlic was not merely perishable, but was actually perishing from before the time when it was sold. The learned District Judge has particularly referred to the evidence of Mr. Nair, Assistant Traffic Superintendent, who supervised the sale of the garlic by auction. This officer had stated that he found that the garlic had already been damaged to a great extent when the sale took place. The finding arrived at by the final Court of fact on the nature of the goods is a finding of fact and is binding on us in second appeal. Furthermore, I am of the opinion that the learned Munsif approached the case from a wrong point of view. He held that the goods were not perishable merely because the railway company had not sold the goods at once or within a very short time. I have already stated that the goods were received at Hindupur on 1-8-1942, and, were sold on 9-9-1942. The mere fact that the railway company did not sell the goods at once or within a very short time does not necessarily change the nature of the goods. Whether the goods are perishable or not depends on the nature and character of the goods, and perishability may be one of degree; some goods may perish very soon and others may take a little longer time, though perishable by its nature means subject to speedy decay. The nature of the goods does not depend on the time the railway company took in disposing them of. For example fresh fruits like mangoes and lichis are undoubtedly perishable goods. The nature does not undergo a change merely because the railway company does not sell them at once or within 24 hours. For these reasons, I am of the view that the learned Additional District Judge has rightly found that the goods in question were perishable goods.

[4] I now come to the other question, namely, what protection is available to the railway company in respect of these perishable goods. Reference has been made to Ss. 55 and 56, Indian Railways Act. I do not propose to give in detail the terms of S. 55, Railways Act, as, in my opinion, the present case, is governed by S. 56. That section relates to disposal of unclaimed things on a railway. Sub-section (1) says, among other things, that

"when goods have come into the possession of a railway administration for carriage or otherwise and are not claimed by the owner or other person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be served upon him, requiring him to remove the goods,

Sub-section (2) says that

if such owner or person is not known or the notice cannot be served upon him or he does not comply with the requisition in the notice the railway administration may, within a reasonable time, subject to the provisions of any other enactment for the time being in force, sell the goods as nearly as may be under the provisions of the last foregoing section, rendering the surplus, if any, of the proceeds of the sale to any person entitled thereto.

In the case before us, the railway company knew only that Chulhai Naik was the consignor and Bhagwan Mahton and Jugeshwar Mahton were the consignee. The address of these persons was not known to the railway company. It has been found by the final Court of fact that railway receipt which the plaintiff obtained was not produced before the railway company: this railway receipt had certain endorsements in favour of the Chettys. But the railway company was not in a position to know that the Chettys were entitled to receive the goods. Not knowing the address of either the consignor or the consignee the railway company made enquiries from the despatching station, namely, Rosera, in order to find out the address of the the consignor. These

enquiries, however, did not yield any result, because the telegrams sent were not received due to the civil disturbances which were taking place in the district of Darbhanga at the time. That being the position, the railway company was not in a position to know who the owner or person entitled to the goods was; nor was the railway company in a position to serve any notice on such owner or person. In these circumstances, sub-s. (2) of S. 56, Railways Act, came into play and the railway company was entitled to sell the goods within a reasonable time, subject, however, to two conditions namely, (1) subject to the provisions of any other enactment for the time being in force and (2) complying as nearly may be with the provisions of the preceding section, namely, S. 55, Railways Act. In respect of perishable goods S. 55 allows the railway administration to sell them by public auction at once. No notice either to the owner or to the consignee is necessary in respect of perishable goods; nor is it necessary to publish a notice of the intended auction in any local newspaper. Sub-section (2) of S. 55 says in clear terms that when the goods detained under that section are perishable goods, the railway administration may sell them at once. In the case before us the railway company did not sell the goods at once; they tried to find out the address of the consignor and the consignee and they also waited for sometime to see if anybody turned up to take delivery of the goods. When the railway company found that nobody was claiming the goods, and the goods were already suffering damage and deterioration and were likely to perish completely, they took steps to get them sold by public auction. Before doing so, a notice of the intended auction was circulated to all local merchants. All these steps were taken at the end of the first week of August. At the first attempt no merchants turned up to buy the goods. It was only at the second attempt that the goods were sold for a sum of Rs. 1000 even then on the undertaking that the railway company would supply a wagon to the buyer to take the goods away from Hindupur. Reference may also be made in this connection to certain rules made under S. 47, Railway Act. Rule 13 of the said rules says that subject to the exception mentioned in R. 18 unclaimed goods shall be kept on hand at the station to which invoiced for a period of not less than one month during which time the notice prescribed in S. 56, sub-s. (1), Railways Act, will, if possible, be served upon the person appearing entitled thereto. The exception contained in R. 18 relates to perishable articles. That rule lays down that unclaimed perishable articles may be disposed of by the station master of the station at which they may be left after the expiry of 24 hours or earlier if they are, or are likely to become, offensive. Then, there is R. 21 which says that public sales by auction shall be held from time to time of all unclaimed or lost property which has remained in the possession of the railway administration for over six months. At least 15 days' previous notice of each auction shall be given by advertisement in a newspaper. Learned counsel for the appellant has very strongly contended before us that the railway company had not complied with these rules inasmuch as no advertisement in a local newspaper was published regarding the intended auction. The Court of appeal below has found that there is no local newspaper which is published in Hindupur. The matter can, however, be looked at from another point of view. With regard to perishable goods the relevant rule is R. 18. It is an exceptional rule, which relates only to articles of a perishable nature. That rule says that the station master is entitled to sell by auction such goods after the expiry of 24 hours; he may even sell them earlier if they are likely to become offensive. The railway company was, therefore, entitled in the present case to sell the goods by auction without any advertisement of the intended auction in a local newspaper. The railway company did, however, take the precaution of giving wide publicity to the intended auction by circularizing a notice to the local merchants. In my opinion, the railway company is protected under S. 56, Railways Act, and there has been no breach of the rules made under S. 47, Railways Act.

[5] The railway company are not, therefore, liable, and the appeal so far as the railway company are concerned must be dismissed with costs.

[6] Then remains the question of the liability of the Chettys. There has been no appearance on behalf of the Chettys before us, and learned counsel for the appellant has frankly conceded that he does not challenge the finding of the learned Additional Judge with regard to the deduction of the sum of Rs. 200 which the Chettys had sent to the present appellant by telegraphic money order; nor does he challenge the small items regarding "gosala" "thakurbari" etc., which the learned Additional District Judge has found did not properly form part of the price of the garlic. Learned counsel has, however, contended that the learned Additional District Judge was wrong in giving a deduction for the sum of Rs. 181-5-0 which is lying in deposit with the railway company. He has also contended that the appellant should have been given damages which he had claimed, particularly when the Chettys did not appear to contest the claim of the appellant. As to the

sum of Rs. 181-5-0, the contention of learned counsel for the appellant is that the railway company was demanding charges for wharfage and the sum of Rs. 181-5-0 was not a sum which was payable to the appellant irrespective of the question of the payment of wharfage charges. In my opinion, the contention of learned counsel for the appellant with regard to this sum of Rs. 181-5 0 is correct. The Chettys had agreed to purchase the 189 bags of garlic. Their plea that the garlic was not of the required quality has not at all been substantiated. As a matter of fact, the Chettys did not appear to contest the claim of the appellant. They are, therefore, liable for the full price of the garlic which they had contracted to buy, and no deduction in respect of Rs. 181-5-0 lying with the railway company can be given in favour of the Chettys. I am saying nothing here about the right of any of the parties to the said sum of Rs. 181-5-0 which is lying in deposit with the railway company. As to the claim for damages, the learned Additional District Judge has rightly pointed out that the appellant did not explain what further loss or damage he had sustained apart from the price of the garlic. He has further pointed out that no damages by way of interest were claimed by the appellant.

[7] In the result I would allow the appeal against the Chettys only to the extent that the deduction directed to be made by the learned Additional District Judge in respect of the sum of Rs. 181-5-0 should be set aside. The final result, therefore, is that the appeal against the railway company is dismissed with costs, and the appeal as against the Chettys is allowed to the extent indicated above. As against the Chettys there will be no order for costs.

**Ray J.** — I agree.

S.C. *Appeal partly allowed.*

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## A. I. R. (35) 1948 Patna 382 *[C. N. 131.]*

SINHA AND MUKHARJI JJ.

*Mt. Ajhola Kuar and another*—*Petitioners* v. *Mt. Bal Kuar and another*—*Opposite-Party.*

Civil Revn. Nos. 711 and 744 of 1946, Decided on 1-8-1947, from order of Sub-Judge, 1st Court, Gaya, D/- 5-6-1946.

(Bengal) Land Registration Act (7 [VII] of 1876), S. 55—Reference under — Civil Court has to determine right to possession—Refusal of Court to determine— High Court can interfere in revision—Civil P. C. (1908), S. 115.

On a reference under S. 55, the right to possession has to be determined by the civil Court and the scope of such an enquiry is much wider than an enquiry into the factum of possession. It may be that, as under the law all possession is an index of title, the person in possession may prove his title by the fact of his possession. But sometimes it may be that a trespasser may be in possession after the death of the propositus or the limited owner. In that case the civil Court may have to determine the question as to the right of possession with reference to the title to the property : 20 A I R 1933 Pat. 41, *Doubted.* [Para 5]

Where on such a reference the civil Court refuses to determine the question the revisional powers of the High Court are attracted. [Para 8]

Annotation : ('44-Com.) Civil P. C., S. 115 N. 11.

*Case referred* :—

1. ('33) 20 A. I. R. 1933 Pat. 41 ; 141 I. C. 477, Janmejoy Pate v. Gopinath Bharathi.

*Lalnarain Singha, Girish Nandan Sahay Sinha and Jamuna Prasad Chaudhury* — for Petitioners.

*Sarjoo Prasad and Kameshwar Dayal* — for Opposite Party.

**Sinha J.**—These two applications in revision arise out of the same orders passed by the learned Subordinate Judge of Gaya in a reference under S. 55, Land Registration Act.

[2] It appears that one Padarath Singh died possessed of certain proprietary interest in a number of villages, leaving him surviving his widow, Musammat Sakal Kuar. It is also alleged that he was survived by two daughters, the two petitioners in the revisional applications before this Court. On his death, Musammat Sakal Kuar got herself registered as his heir and legal representative in the Collector's D Register in respect of the proprietary interest in those villages. With her consent, Musammat Bal Kuar and Musammat Jararo Kuar, the two widowed daughters-in-law of the propositus, were also allowed to be entered along with the widow in the Collector's registers. That mutation was made sometime in 1923, and the following orders of the Land Registration Deputy Collector passed on 23-1-1923, are rather significant :

"The title of Mt. Sakal Kuar to succeed to her husband's property is indisputable. The title of the two widowed daughters-in-law may very well be questioned. Mt. Sakal Kuar has no objection to the mutation of their names along with her; rather she wishes it. The Musammat is a limited owner, i. e. whatever she does in regard to the property of her late husband will have effect only till her life time. There seems to be no objection in allowing the mutation of their names along with her. . . . Of course, after the death of the widow, her actions will not be binding upon the reversioners. In these circumstances I allow the mutation of the applicant's names and disallow the objections."

Things stood like that until Musammat Sakal Kuar died in February 1942. On her death, the two petitioners made several applications for the mutation of their names, each claiming to be recorded with respect to the entire sixteen annas interest in the inheritance of their alleged father, Padarath Singh. These applications of the alleged daughters of Padarath Singh were opposed by the two daughters-in-law aforesaid, who already stood recorded along with Musammat Sakal Kuar. The Land Registration Deputy Collector allowed the petitioner's applications for registration, holding that they were the daughters of the

propositus, and that their evidence of possession, though meagre, might be in conjunction with their superior title, preferred to the evidence of possession given by the objectors, the daughters-in-law. Those orders were set aside by the Collector who held that the daughters in-law were in possession,and, therefore, should be recorded in the Collector's D Register. The Collector's orders were upheld on appeal to the Commissioner. The Board of Revenue was moved by the petitioners, and the Board, not being satisfied with the approach to the case by the subordinate Courts, passed the following orders :

"It seems to the Board that, as both title and possession are the subject of vehement dispute, this is eminently one of those cases which should properly be determined by a civil Court. It is, therefore, ordered that the Collector should refer the matter in dispute, under S. 55, Land Registration Act, to the Principal Civil Court of the District."

[3] On this reference, the parties, before the Civil Court appears to have agreed that the matter might be decided on the evidence already recorded by the Revenue Courts. Hence, the learned Subordinate Judge, Mr. Samad, before whom the matter was fought out, purported to determine the questions before him on the evidence already recorded by the Revenue Courts. The learned Subordinate Judge was inclined to think that the reference to the Civil Court under S. 55, Land Registration Act was incompetent, inasmuch as the Collector had decided the question of possession in favour of the objectors, the daughters-in-law. He also adopted the finding of the Revenue Courts that the petitioners were as a matter of fact, the daughters of the propositus Padarath. He similarly adopted the findings on the question of possession of the Revenue Courts, that is to say, the findings of the Collector and the Commissioner, which had not been upheld by the Board of Revenue. He was emphatically of the opinion that the daughters-in-law were in possession, though as trespassers. His conclusion, in effect, was that the petitioners, who were the daughters of Padarath, were entitled to the properties, but not being in possession, were not entitled to be registered in the Collectorate record. Similarly, he came to the conclusion that the daughters-in-law the opposite party, though in actual possession, were not entitled to be registered in place of Musammant Sakal Kuar, as they were not entitled to the property. In the result he directed that 'no new entries are to be made in the register by way of mutation of any persons' name.' Hence, these applications in revision by the petitioners, who claim to be the daughters of Padarath.

[4] It has been argued on their behalf by Mr. Lalnarain Sinha, in the first instance, that the learned Subordinate Judge misapprehended the scope of the reference before him, and that the only question which he had to determine under the reference was the right to possession of the properties in question. It has further been argued that the learned Subordinate Judge was not competent to go behind the reference and to challenge the legality of the reference itself. And, finally he has argued that the learned Subordinate Judge has not determined the only question which he should have determined as to who was entitled to possession of the properties, and thus entitled to mutation in place of the deceased Sakal Kuar.

[5] Under S. 55, Land Registration Act, if, in the opinion of the Collector, the dispute between the parties be one which can more properly be determined by a civil Court, the Collector is directed to refer the matter in dispute to the civil Court for determination "as hereinafter provided." The reference apparently is to the provisions of S. 59 which lays down that the civil Court, to which the matter is referred under S. 55

"shall determine summarily the right to possession in respect of the interest in dispute (subject to regular suit) and shall deliver possession accordingly."

In A. I. R. 1933 Pat. 41[1] the late Sir Courtney-Terrell C. J. is reported to have laid it down that the civil Court is not competent to go into the question of title under S. 55, Land Registration Act. I am not sure that his Lordship has not too narrowly restricted the scope of the enquiry by the civil Court on a reference under S. 55, Land Registration Act. The right to possession has to be determined by the civil Court, and in my opinion, the scope of such an enquiry is much wider than an enquiry into the factum of possession. It may be that, as under the law all possession is an index of title, the person in possession may prove his title by the fact of his possession. But sometimes it may be that a trespasser may be in possession, or it may be that there has been a scramble for possession after the death of the propositus or the limited owner. In that case the civil Court may have to determine the question as to the right of possession with reference to the title to the property.

[6] Now, coming to the orders under revision, this is another case in which Mr. Samad has tried to take a short cut by adopting, without any discussion, the findings of the revenue Courts without subjecting them to any critical examination. He has decided in favour of the petitioners that they are the daughters of Padarath, simply because the revenue Courts had agreed in coming to that conclusion. He has decided that the opposite party were in possession, simply because the subordinate revenue Courts had taken that view. It may be that the

parties had agreed to base their submissions to the Court on the evidence already recorded by the revenue Courts. But that did not necessarily mean that the findings of the fact should not be independently arrived at on a critical examination of the evidence on the record. The learned Subordinate Judge, in my opinion, should have gone into these questions of fact, and examined the evidence for himself before arriving at those conclusions. It may be that those conclusions are correct. It may be otherwise. Sitting in revision, we cannot go into those questions of fact, but we must record our disapproval of the way in which he has approached the case.

[7] The practical result of the orders of the learned Subordinate Judge is that he has refused to determine the only question which fell to be determined under S. 55 read with S. 59, Land Registration Act. Mr. Sarjoo Prasad, appearing on behalf of the opposite party, suggested, in justification of the orders of the Court below that there already having been a finding by the Collector at the appellate stage that the opposite party were in actual possession, the reference really was incompetent, and the Collector could not be said to be of the opinion necessary to make a reference under S. 55 as laid down in para. 2 of that section. But that argument loses sight of the legal position that the Collector's orders were subject to the revisional powers of the Board of Revenue. Under S. 85 of the Act, the Board of Revenue seems to have undefined and, therefore, unlimited powers of revision and modification. The ambit of his powers of revision have not been laid down in any other section of the Act. Hence it must be taken that the orders of the Collector passed at the appellate stage stood vacated by the orders of the Board of Revenue at the revisional stage, and the Collector, in obedience to the orders of the Board, made a reference to the civil Court, being of the opinion that it was a question which should more properly be determined by the civil Court. The civil Court, therefore, being in seisin of the case under S. 55 of the Act, had to function within the limits laid down by that section and succeeding sections of the Act. The object of the reference under S. 55 of the Act is to have a summary decision of the right to possession of the property in question and the consequential right to have the name of that person, who is determined to have a right to possession registered in the D Register of the Collector. But according to the learned Subordinate Judge, no mutation need be made in place of the deceased Mt. Sakal Kuar, who admittedly, held the property as a widow's estate, which came to an end with her life. There is thus a vacuum created by her death in the revenue records, and that has to be filled in by some other names. That has got to be determined by the civil Court.

[8] It was next contended by Mr. Sarjoo Prasad that, as a remedy by way of a suit is open to the petitioners, this Court sitting in its revisional jurisdiction, should not exercise its powers. It is enough to point out that the order under revision is such an exceptional order which attracts fully the revisional powers of this Court, inasmuch as the learned Subordinate Judge has refused to determine the only question which fell to be determined in terms of the reference made by the revenue Courts. It is not one of those case where the question has been determined rightly by the civil Courts, and the matter comes in its revisional jurisdiction before this Court. The orders of the learned Subordinate Judge, as already indicated, call for interference so that the injustice which may be caused by his orders should be set right.

[9] In view of these considerations, the orders passed by the learned Subordinate Judge are set aside, and the case sent back to the Court below for a fresh determination on a review of the evidence already on the record in the light of the observations made above. The petitioners are entitled to their costs; hearing fee two gold mohurs.

**Mukharji**—I agree.

S.C. *Revision allowed.*

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**A. I. R. (35) 1948 Patna 384** *[C. N. 132.]*

SINHA AND MUKHARJI JJ.

*Mt. Gauhar Jehan Begum* — *Appellant* v. *Mt. Imteyaz Jehan Begum and others* — *Respondents.*

A. F. O. O. No. 306 of 1945, Decided on 24 7-1947, from order of Sub-Judge, Patna, D/- 28-7-1945.

**Civil P. C. (1908), S. 16 (d) — Scope — Suit for dower and administration of estate — Only small portion of property within Court's jurisdiction — S. 16 (d) and not S. 20 held applied — Court held had jurisdiction over suit — Civil P. C. (1908), S. 20.**

A Muhammadan widow brought a suit for recovery of her dower debt and also for the administration of her deceased husband's estate in the Court within the territorial jurisdiction of which only a fractional portion of the properties was situated. A relief for declaring the dower debt as charge on the estate was also prayed for. The Court treated the suit as an administration suit but returned the plaint on the ground that S. 20, stood in the way of the plaintiff:

*Held*, that S. 16(d) and not S. 20 applied and the Court had jurisdiction to entertain the suit: 15 A. I. R. 1928 Mad. 760 and 13 A. I. R. 1926 Lah. 503, *Rel. on :* [Para 2]

**Annotation:** ('44-Com.) C. P. C., S. 16, N. 8; S. 20, N. 28.

*Cases referred:*

1. ('28) 15 A. I. R. 1928 Mad. 760 : 110 I. C. 276, Mt. Amir Bi v. Abdul Rahim.
2. ('26) 13 A. I. R. 1926 Lah. 503 : 96 I. C. 691, Shiv Ram v. Prahlad Rai.

*B. C. De and A. H. Fakhruddin*—for Appellant.
*S. A. Saghir, Hamid Masud and Syed Hassan*—for Respondents.

**Mukharji J.**—This miscellaneous first appeal is by Mt. Gauhar Jehan Begum who was plaintiff in Title Suit No. $\frac{40/43}{18/44}$ which was filed in the Court of the Second Additional Subordinate Judge at Patna. The plaint has been returned by the Subordinate Judge on the ground of want of territorial jurisdiction. A few relevant facts may be stated here. The plaintiff is the widow of one Syed Ahmad Hussain of Asthawan in the district of Patna. She brought the present suit for recovery of her dower debt and also for the administration of her deceased husband's estate. The learned Additional Subordinate Judge treated it as an administration suit but returned the plaint as in his opinion S. 20, Civil P. C., stood in the way of the plaintiff. It is an admitted fact that most of the properties belonging to the estate of the deceased lie outside the district of Patna where the suit was filed. It would appear that only a fractitional portion of the properties is situate in this district.

[2] Mr. B. C. De arguing for the appellant has contended that it is S. 16, Civil P. C., which is applicable to the facts of the case and not S. 20 of the same Code. There is no dispute between the parties that an administration suit does lie in a case like this. If any authority is needed, one might refer to A. I. R. 1928 Mad. 760.[1] The whole question in this case is whether S. 16, Civil P. C., applies. The learned advocate for the respondents contended that as it is not a suit for the recovery of immovable property, S. 16 has no application. Mr. De, on the other hand, contended that S. 16(d) is applicable. Section 16(d) reads like this:

"Subject to the pecuniary or other limitations prescribed by any law, suits for the determination of any other right to or interest in immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

One has only to refer to the relief portion of the plaint to be convinced that cl. (d) of S. 16 applies to the present case. Relief No. 2 in the plaint asks for a decree for a specified sum of money by way of dower debt. Later on, the same relief is to the effect that the Court might declare that the dower debt is a charge upon the estate of deceased Syed Ahmad Hussain. This mention of the word "charge" in Relief No. 2 brings the case within the purview of cl. (d) of S. 16, Civil P. C. In this connection a reference may also be made to a ruling reported in A. I. R. 1926 Lah. 503.[2] In this case the deceased had properties in Burma and in the district of Ludhiana in the Punjab. After her death, probate proceedings were taken in Burma and an administration suit was filed in the district of Ludhiana where also, as just stated, there was some property of the deceased. It was held that the administration suit was properly filed in Ludhiana.

[3] For the reasons stated above, it is held that the learned Additional Subordinate Judge had territorial jurisdiction in the present case. His order directing that the plaint should be returned for presentation in a proper Court is set aside. The appellant will be entitled to her costs of both the Courts payable by defendants 4 and 5 who alone have contested the present appeal.

[4] **Sinha J.**—I agree.

S. C. *Appeal allowed.*



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**A. I. R. (35) 1948 Patna 385** *[C. N. 133.]*

MANOHAR LALL AND RAMASWAMI JJ.

*S. C. Mazumdar, Receiver — Appellant* v. *Commr. of Income-tax, Bihar and Orissa — Respondent.*

Misc. Judicial Case No. 154 of 1945, Decided on 29-8-1947; reference made by Income-tax Appellate Tribunal, Bombay.

Income-tax Act (11 [XI] of 1922), Ss. 9 and 41 — Members of Hindu joint family each owning distinct one-third share — Suit for partition — Receiver appointed by Court taking possession of property and managing business — Receiver whether principal officer of association of persons — Amalgamated assessment — Validity of.

Under a final decree for partition a receiver was appointed by the Court of certain estate, including a colliery, belonging to a Hindu joint family of three representatives, each owning a distinct one-third share. The members of the family had absolutely no hand in the management of the estate which was done entirely by the receiver, who employed contractors for cutting the coal and paid the raising charges, and also collected the royalties from the lessees of the estate. In the year in question the receiver was assessed to the income-tax on the total income of Rs. 69,000 consisting of Rs. 21,000 as royalties paid by the lessess and Rs. 48,000 as the profit in the business carried on by him as the principal officer of an association of persons, namely the representatives of joint family. Question was whether such an amalgamated assessment was valid in law:

*Held*, (1) that Rs. 21,000 could not be taxed in one lump sum as profits of any business carried on by association of persons as letting out of property is not carrying on any trade or business the business being carried on by the lessees; and that, under S. 9 (3), the property having been owned by persons whose shares were distinct could not be assessed as that of an association of persons; [Para 9]

(2) that as to Rs. 48,000 the members of the family did not form an association of persons, particularly when they had disassociated themselves from each other by filing a suit for partition, and the assessment could only be made on the receiver who carried on the business on behalf of the estate under the order of the Court: 21 A. I. R. 1934 P. C. 116, *Rel. on*; [Para 14]

(3) and that under S. 41 (1), tax should be levied upon the receiver to the same amount as it would be leviable upon and recoverable from each of the representative owner: 32 A. I. R. 1945 Pat. 494, *Rel. on*. [Para 15]

*Cases referred:—*

1. ('34) 7 I. T. C. 195 : 21 A. I. R. 1934 P. C. 116 : 58 Bom. 317 : 61 I. A. 209 : 148 I. C. 855 (P. C.), Currimbhoy Ebrahim v. Commr. of Income-tax, Bombay.
2. (1917) 7 Tax Cas 419, William v. Singer.
3. ('39) (1939) 7 I. T. R. 394 : 26 A. I. R. 1939 P. C. 163 : I. L. R. (1939) 2 Cal. 300 : I. L. R. (1939) Kar P. C. 304 : 182 I. C. 5 (P. C.), Keshardeo Chamaria v. Commr. of Income-Tax, Bengal.
4. ('45) 1945-13 I. T. R. 189 : 32 A. I. R. 1945 Pat. 494, Commr. of Income-Tax, B. & O. v. Habibur Rahman.

*B. N. Jala and S. C. Sinha* — for Appellant.
*S. N. Dutt* — for Respondent.

**Manohar Lall J.**—This is a reference under S. 66 (1), Income-tax Act, at the instance of the assessee by the Income-tax Appellate Tribunal. The question referred to us is:

"Whether in the facts and circumstances of the case, the amalgamated assessment on the receiver as the principal officer of an association of persons is valid in law?"

[2] The facts found are that the Trigunaits are governed by the Mitakshara School of Hindu Law in which the plaintiffs as representatives of Janardan Trigunait have one-third share, the representatives of Sham Lal Trigunait one-third share, and the remaining one-third belongs to the representatives of Santustamoni Trigunait. Bhubneshwar Trigunait and Mukteshwar Trigunait as representatives of Janardhan Trigunait instituted Title Suit No. 139 of 1906 for partition of the family estate consisting of certain collieries and royalty bearing lands. The Subordinate Judge of Purulia on 15-2-1907, passed an interlocutory order for the appointment of a receiver, but as the parties did not agree to the person to be appointed as receiver, he on 25th February tentatively appointed one Tewari as receiver, and after obtaining sanction of the Judicial Commissioner he appointed Tewari as a permanent receiver on 9-4-1907. It was directed by that order that the parties should deliver to the receiver all the stock-in-trade, books of accounts, etc., including coal-fields and mines and all other properties of the estate, and further that the tenants and occupiers of the estate "do attorn and pay their rents, royalties, price of coals in arrear" etc., to the receiver. The appeal to the High Court was dismissed and a preliminary decree for partition was passed on July, 1908, by which *inter alia* it was decreed, after defining the shares of the parties as aforesaid, that:

"The colliery at Angerpathra and the coal lands at Angerpathra be kept ijmal under the management of the receiver and the distribution of profits by him to the parties in respect of their shares till such time as the parties may mutually agree to the division or any other course to be adopted in the matter."

Against the preliminary decree there was an appeal to the High Court, but the parties entered into a compromise on 4-5-1909. The relevant terms of this compromise are that certain coal lands in Angerpathra which were in the occupation of the Union Coal Company should be taken out of the management of the receiver, but in other respects the decree of the trial Court was confirmed. The final decree in the partition suit was made on 16-2-1910 and this arrangement continued till 11-4-1931 when Mr. Mazumdar was appointed the receiver in place of Mr. Tewari, and since then the colliery at Angerpathra and other royalty bearing lands have been in his possession and management.

[3] The income from these lands and collieries is the subject-matter of the assessment in the present case. From 1925-26 right up to 1939-40 the assessments have been made on the Trigunait Brothers' estate through the receiver, but the total income was being distributed among the beneficiaries in proportion to their respective shares, and the tax applicable to each was recovered from the receiver in accordance with the provisions of S. 41, Income-tax Act.

[4] In the year 1940-41, the assessment was made treating the assessee as an unregistered firm, but on appeal by the assessee the Appellate Tribunal cancelled the assessment and remitted the proceedings to the Income-tax Officer for a further investigation of the question as to what was the true status of the assessee and specially his objection "the assessment should be done as in the past on defined shares." The Income-tax Officer after investigation made the assessment treating the Trigunaits as an association of persons through the receiver, Mr. Mazumdar, but unlike the preceding assessment, he assessed the entire income in the hands of the receiver as one unit, and, therefore, necessarily at a higher rate. The assessment was made similarly for the year 1941-42.

[5] The assessment year in the present case is 1942-43. The assessee raised the same contention that as the shares of the beneficiaries were defined and the collieries were kept ijmal or under the management of the receiver, as division by metes and bounds was impracticable and there was no jointness of interest as between the share-holders and the parties had no voice in the management of the receiver, the tax should be held to be recoverable from the receiver separately for each of the beneficiaries in proportion to his share of the total income. These contentions were overruled by the Income-tax Officer who found the taxable income to be Rs. 69,797, that is to say Rs. 21, 747 the amount paid by the lessees to the receiver as royalty and Rs. 48,050 as the amount of profit made by the receiver who employed contractors to carry on the business of coal cutting and raising it on the pit-head.

[6] The Income-tax Officer says in his order that he gave Mr. Mazumdar, the receiver, an opportunity to show cause why he should not be treated as the principal officer of the association. The receiver made an objection in writing that he was subject to the control of the Court who appointed him and was independent of the co-owners in all respects. The Income-tax Officer observed at p. 9 :

"That may be so, but it is apparent that he is in charge of the management, competent to enter into contracts, to receive and pay cash and responsible for correct accounting and in fact for everything that is necessary for proper conduct of the business. I think there is no better person, who can be treated as the principal officer and under S. 2 (12) of the Act he is so treated."

[7] Against this decision, there was an appeal to the Appellate Assistant Commissioner who while reducing the income by a sum of Rs. 4,523 affirmed the order of the Income-tax Officer in the main.

[8] The matter was then taken to the Appellate Income-tax Tribunal who by an order dated 19th August 1944 dismissed the appeal and observed at the end of the judgment that although the receiver was originally

"appointed by the Court, but it appears that he has since been kept on by consent of parties. It is open to the parties to divide the estate by fixing valuation of shares but they have agreed to continue management through the receiver who is appointed by consent for the future management."

The Appellate Tribunal, who have now made the reference, have pointed out while stating the facts of the case at p. 4 : "It is not a fact that the parties agreed before the High Court that Babu Suresh Chandra Tewari be appointed a receiver" — they have shown that this is the correct position by referring various orders of the Subordinate Judge and the High Court. It must, therefore, be taken that the receiver in the present case is in possession not with the consent of the parties but under the orders of the Court.

[9] The critical question, therefore, to decide is whether the assessees are association of persons and whether the provisions of S. 41 cannot be applied to the present assessment. To begin with, it may be at once stated that Rs. 21,747, which is the amount paid by the lessees, cannot be taxed in one lump sum as being the profits of any business carried on by an association of persons. Letting out property is not carrying on a trade or business—the business would be carried on by the lessees to whom the property is let. The previous conflict of case law is now solved so far as income from property is concerned by the insertion of sub-cl. (3) to S. 9 where it is clearly stipulated that where property is owned by two or more persons and their shares are definite and ascertainable, they cannot be assessed in respect of the income from such property as an association of persons. On this being pointed out, the learned standing counsel, as was to be expected, conceded the position.

[10] With regard to the remaining sum, the question is whether the assessees can be treated as an association of persons. There has been a conflict of decisions in the various High Courts as to whether the expression 'association of persons' should be construed *ejusdem generis* with the previous words which occur in the charging section, namely Hindu undivided family, company, local authority and firm, or whether it should be construed in its ordinary plain meaning. In support of the latter view, reference is made to the Oxford Dictionary where it is said that associate means "to join in any purpose or to join in an action" and, therefore, it was held that the persons can only be called an association of persons if they join together and remain so joined with the purpose of buying and holding properties. It is unnecessary to express a final view upon this difficult question in the present case.

[11] All the High Courts are agreed that the question whether the assessees are an association of persons depends upon the facts and circumstances of each case. Now, what are the facts which have been found in the present case ? (1) that the receiver appointed by the civil Court is in possession of the collieries; he is employing contractors for coal cutting, and all the raising costs are paid by him, and (2) that the Trigunaits have no hand whatsoever in the business which produces royalty. On these admitted facts the inference that the Trigunaits are an association of persons is not warranted in law—indeed the Trigunaits have dissociated themselves from each other because a partition suit is pending between the parties in which each party may well be treated as a plaintiff.

[12] That being the position it follows that this is one of those cases in which the receiver is carrying on a trade or business on behalf of the estate of which he has been appointed the receiver by an order of the civil Court. The assessment, therefore, should have beee made and could only be made on the receiver — *see* the Privy Council case in 7 I. T. C. 195[1] where the true effect of the decision in the well known House of Lords' case in (1917) 7 Tax. Cas. 419[2] was explained and it was observed that there may be circumstances in which the assessment must be made upon the trustee. The present case, however, is unlike the Privy Council case in 1939 I.T.R. 394[3] where their Lordships found as a fact that no receiver was appointed by the Court, but the co-owners were allowed to realise their rents on giving joint receipts.

[13] The learned standing counsel correctly argued that S. 41 was a machinery section, and the department is not bound to resort to it—this is now specifically provided by S. 41 (2) which entitles the department to assess a person on whose behalf income, profits or gains are receivable. But the facts found here are that the Trigunaits are not in possession of the estate, are not carrying on any trade or business themselves, are not an association of persons, and the profits and gains of the business are receivable and received by the receiver himself on account of the business which he himself carries on though he is ultimately accountable to the parties through the civil Court, who appointed him. The department may if they like assess the individual Trigunaits separately for his share of the profits in the colliery business.

[14] For these reasons, I am of opinion that in this case the assessment should have been made upon the receiver or upon each of the Trigunaits separately for his share as there is no "association of persons" as contemplated by the Act.

[15] The learned advocate for the assessee then relying upon S. 41 (1) contended that the tax should be levied upon the receiver only to the same amount as it would be leviable upon and recoverable from each of the Trigunaits. In support of his contention, he relied upon the case in 1945 I.T.R. 189[4] where the mutwalli of a trust consisting of 24 beneficiaries was held taxable on the basis of the profits falling to the share of each of the beneficiaries and not on the footing of all the beneficiaries constituting an association of persons—in this case the profits were derived from a distillery belonging to the wakif of which he made a wakf constituting himself as the sole mutwalli. In my opinion, the contention of the learned advocate is well-founded, and I would hold that the assessment should be made under S. 41 (1).

[16] For these reasons, the answer to the question is that on the facts and circumstances of this case the amalgamated assessment on the receiver as the principal officer of an association of persons is invalid. The assessee having succeeded is entitled to the costs of this reference which are assessed on a consolidated sum of Rs. 350.

**Ramaswami J.** — I agree.

D.R.R. *Answer accordingly.*

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**A. I. R. (35) 1948 Patna 388** *[C. N. 134.]*

SINHA AND MAHABIR PRASAD JJ.

*Lakhan Lal Jha and another* — *Defendants—Appellants* v. *Jiwach Jha, Plaintiff and others—Defendants—Respondents.*

A. F. O. No. 915 of 1946, Decided on 3-2-1948, from decision decree of Addl. Sub-Judge, Darbhanga, D/- 6-4-1946.

**Civil P. C. (1908), S. 11—Previous suit by father as leading member on behalf of entire joint Hindu family — Subsequent suit by son for similar relief is barred even if he was minor at time of previous suit.**

**Where in a previous suit the father as a leading member of joint Hindu family has claimed a declaration on behalf of the entire family that certain sale did not bind the interest of the joint family other than that of the vendor, the decision in that suit is *res judicata* in a subsequent suit for similar relief brought by the son though he was a minor at the time of the previous suit and not impleaded as party as he must be deemed to be represented fully and completely in the previous suit : 14 A. I. R. 1927 P. C. 56, *Rel. on.*** [Paras 7 & 9]

**Annotation : ('44-Com.) Civil P. C., S. 11, N. 61, Pts. 4 and 5.**

*Case referred :—*

**1. ('27) 54 I. A. 122 : 14 A. I. R. 1927 P. C. 56 : 51 Bom. 450 : 101 I. C. 44 (P. C.), Lingangowda v. Basangowda.**

*Rati Kant Chaudhury* — for Appellants.

*Janak Kishore* — for Respondents.

**Sinha J.**—This is a second appeal on behalf of the defendants-first-party from the decision of the learned Subordinate Judge of Darbhanga reversing that of the Munsif of Samastipur in a suit for a declaration that the sale deed, dated 12-11-1938, executed by defendant 3 in favour of the defendants-first party, appellants in this Court, was not binding on the family of which the plaintiff was a member.

[2] It appears that the common ancestor, Jairam Jha, had three sons, Ram Sarup, who is defendant 4 in this suit, Sitaram Jha whose son Sukhdeo Jha is defendant 5, and Adhik Lal Jha, who is defendant 3 in this suit. The plot in question, namely, plot No. 1424, along with other plots, had been acquired in the year 1910 in the name of Adhik Lal Jha, defendant 3. It is now common ground that Adhik Lal is not a member of the joint family of which the plaintiff claims to be a member. It also appears that there was a title suit, No. 8 of 1941, in respect of this very plot of land instituted by the plaintiff's father, Ram Sarup, and other members of the family for a declaration that the disputed plot was joint family property, which defendant 3 had no right to sell in its entirety, and that the plaintiff's two-thirds share in that plot was not affected by the sale deed executed by defendant 3 in favour of the defendants-first party. It is not absolutely clear whether or not the plaintiff in the present suit was a party; but this much is clear that he was a junior member who was in his minority

at the time the previous suit had been instituted. The defendants-first party appellants, who contested the previous suit also, claimed the entire plot on the ground that it was the exclusive property of defendant 3; who also was a defendant in that suit, and that he was entitled to convey that plot to the contesting defendants. The suit was contested up to the appellate stage, and it was held by both the Courts concurrently that the plot in question was the exclusive property of defendant 3 and that the plaintiffs had failed to prove their interest in the same. That suit ended in July 1943. That may be characterized as the first round in this litigation. The second round began in February 1944, when the present plaintiff who is the son of the leading plaintiff in the previous suit claimed that the sale deed executed by defendant 3 in favour of the defendants first party did not affect the two-third interest of the family, inasmuch as Adhik Lal, the vendor, could not have conveyed more than this one-third interest in the plot.

[3] The suit was contested again by the defendants first party chiefly on the ground that the previous decision between the parties was *res judicata*, and that, at any rate, the plot was the exclusive property of defendant 3 who could have conveyed a valid title to the defendants first party.

[4] The trial Court dismissed the suit, holding that the previous decision was *res judicata* between the parties, and that on merits also the plaintiff had failed to prove that the plot in question was joint family property in which the plaintiff could be interested.

[5] On appeal by the plaintiff, the lower appellate Court has held that the previous decision was not *res judicata* chiefly on the ground that the plaintiff in the present suit, though the son of plaintiff 1, in the previous suit, did not claim through his father being a member of a joint Hindu Mitakshara family. It also held that, in view of the partition deed of the year 1922, it was apparent that this property was dealt with as belonging to the entire joint family headed by Jairam Jha. Hence this second appeal by the defendants first party.

[6] This appeal came before me sitting singly, and, as it involved a question of *res judicata*, I referred it to a Division Bench for hearing. On going through the decision of the previous case, it is apparent that the leading plaintiff in that suit was the father of the plaintiff in the present suit. He claimed the property on behalf of the whole family and also a declaration that the sale deed executed by defendant 3 in favour of the defendants first party did not bind the interest of the joint family other than that of the vendor himself. Hence, it is apparent that the issues in the two suits were identical, and if it is held that the previous judgment is *res judicata* between the parties, the question on merits need not be gone into. Mr. Janak Kishore, appearing on behalf of the plaintiff-respondent, has argued that the plaintiff in the present suit was a minor and not a party to the previous litigation, and, as he did not claim through his father, the previous judgment cannot be *res judicata* in the present litigation. In my opinion, the decision of their Lordships of the Judicial Committee of the Privy Council in 54 I. A. 122[1] is a complete answer to this contention. The following observations of their Lordships of the Judicial Committee are in point :

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to the Expln. 6 of S. 11, Civil P. C., 1908, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors. In this case there is no question of majors. It seems clear that the plaintiff in the previous suit was acting on behalf of himself and his minor children to try to exclude a collateral branch from a share of the family property. If he had succeeded the judgment would have inured for the benefit of the children, and as he has failed, they must take the consequences."

[7] In the present case it would further appear that all the adult members of the plaintiff's family were parties to the previous suit, and the claim was laid on behalf of the entire family, that is to say, $\frac{2}{3}$rd of the plot excluding the $\frac{1}{3}$rd which the plaintiffs then admitted and now admit to belong to Adhik Lal, the vendor of the appellants. The position, therefore, is that the plaintiff in the present suit, who was then a minor, was not impleaded apparently because his father sued as the leading member of the family. The judgment given in that case clearly indicates that the present plaintiff's father was the karta of the family, and had sued in that capacity. But, even if there had been no such statement in the judgment in that case, if it could be shown that substantially it was a suit on behalf of the entire family, the result would be the same, namely, that a judgment rendered in that litigation would bind the entire family, irrespective of the question of whether or not there were some minors who were or were not impleaded in that question.

[8] Mr. Janak Kishore has sought to get rid of the effect of the decision in the previous suit on the ground that the partition deed of the year 1922, chiefly relied upon by the lower appellate Court, which decided in the plaintiff's favour, had not been adduced in evidence in the previous litigation presumably on account of the negligence of the persons who were in charge of the

litigation. This is not a suit to get rid of the decision rendered in the previous litigation; it is a simple suit for declaration on the ground that the previous judgment between the parties did not affect the rights of the present plaintiff. If the suit had been constituted with a view to having the previous judgment rendered null and void not only against the plaintiff but as against the whole family, other and further considerations may have been relevant; but, as the suit has been so framed, that question does not arise. I do not by any means suggest that there is any justification for the contention that the previous suit had not been litigated *bona fide*.

[9] In view of these considerations, it must be held that the previous decision is *res judicata* between the parties, and that this suit was misconceived. The appeal is accordingly allowed, the judgment and decree passed by the lower appellate Court set aside and those of the trial Court restored with costs throughout.

[10] **Mahabir Prasad J.** — I agree. I just want to add this, the learned Subordinate Judge in disposing of the question of *res judicata* observed :

"The previous judgment would no doubt have operated as *res judicata* if the plaintiff had derived his title through his father but in this case the matter is different. The father and the son both had a right in the joint family property and each of them is at liberty to vindicate his right in a Court of law."

It is evident that his approach to the question was erroneous. The decision of the Judicial Committee cited by my brother Sinha J. in the judgment just delivered proceeds on the footing that, when there is a suit on behalf of a joint family, all the members of the joint family should be deemed to be represented fully and completely, and, when a subsequent suit is brought as against that family, the objection that one member of the joint family was not a party to the previous suit cannot be raised. It is not a question of the plaintiff claiming under the title derived from his father, and, therefore, the principle that in a coparcenary each member has an independent right and does not claim under another does not arise. As already stated, the previous suit was instituted by Ramsarup alone for the whole family, and, therefore, even if the present plaintiff was not specifically named as a party, he must be deemed to have been a party to that suit.

D.S. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 390** *[C. N. 135]*

SINHA AND MAHABIR PRASAD JJ.

*Kashi Prasad Singh and others — Plaintiffs—Appellants* v. *Ram Prasad Singh and others — Defendants — Respondents.*

A. F. A. D. No. 406 of 1945, Decided on 3-2-1948, from decision of 2nd Addl. Dist. Judge, Monghyr, D/- 17-1-1945.

Bhihar Tenancy Act (8 [VIII] of 1885), Sch. 3, Art. 3 —Execution of decree for rent against raiyat— Mortgagee of raiyat dispossessed as result of delivery of possession to auction-purchaser by Court—Suit by mortgagee for possession — Art. 3 does not apply.

Where in execution of a decree for rent against the raiyat, the mortgagee of the raiyat is dispossessed as a result of delivery of possession through Court to the auction-purchaser, a suit for possession brought by the mortgagee would not be governed by Art. 3 as such suit is not a suit by a raiyat against his landlord to recover possession of his raiyati interest: 27 A. I. R. 1940 Pat. 476 and 17 A. I. R. 1930 Pat. 256, *Disting.* [Para 4]

*Cases referred*:—

1. ('40) 27 A. I. R. 1940 Pat. 476 : 187 I. C. 559, Mt. Deorati Kuer v. Dasrath Dubey.
2. ('30) 9 Pat. 788 : 17 A. I. R. 1930 Pat. 256 : 125 I. C. 565 (F. B.), Gajadhar Rai v. Ramcharan Gope.

*B. N. Rai and K. K. Sinha* — for Appellants.
*L. K. Jha, Lalnarayan Sinha and T. Sinha* — for Respondents.

**Sinha J.**—This is a plaintiffs' second appeal from the concurrent decisions of the Courts below dismissing their suit for possession in respect of 8 bighas and odd kathas of land situate in plot No. 405 in Khata No. 236 in village Ainjani Ghat which was originally Tauzi No. 8783 but which by a collectorate partition, was carved out into separate tauzis including tauzi No. 14539 which was allotted to two persons called Ramraman and Kantiraman. The holding comprised an area of 30.32 acres, including Tauzi No. 405 with an area of 11.68 acres. The original raiyat executed a usufructuary mortgage bond in respect of 9.13 acres out of Plot No. 405 to the plaintiffs. After the collectorate partition, Ramraman and Kantiram sued for arrears of rent in respect of portions of Plots Nos. 405 and 406, with a total area of 16 bighas 3 kathas and odd, some of the original raiyats. A decree for rent was passed on 28-5-1929, and, in execution, the area aforesaid was auction-purchased by defendant 1. Delivery of possession was taken through Court on 26-2-1933. There was a proceeding under S. 145, Criminal P. C., in respect of the land aforesaid, and the criminal Court decided in favour of the auction-purchaser. The judgment in the proceeding under S. 145, Criminal P. C., is dated 9-7-1938. The defendants-first party settled the land with the defendant-second party on 31-1-1941. The suit was commenced on 5-7-1941, by the plaintiffs as mortgagees on the ground that they had been dispossessed by the

defendants though the decree, in execution of which the property had been sold, had only the effect of a money decree, inasmuch as all the tenants had not been impleaded in the rent suit.

[2] The suit was contested by the defendants on the ground that it was barred by limitation in view of the special provisions of the Bihar Tenancy Act, and that the purchase by the defendant first party was in execution of a rent decree properly so called.

[3] The Courts below have dismissed the suit, holding that the special limitation of two years applied to it and, as the plaintiffs had instituted the suit more than two years after the delivery of possession in 1933, it was beyond time. They have also held that the decree, in respect of which the execution proceedings had been taken and the property sold had the effect only of a money decree, inasmuch as all the tenants had not been impleaded in the rent suit.

[4] Hence, in this appeal the only question in controversy between the parties is whether or not the suit is beyond time in view of the provisions of Art. 3 of Sch. III, Bihar Tenancy Act. The lower appellate Court has relied upon a Division Bench ruling of this Court in A. I. R. 1940 Pat. 476[1] for its conclusion that the present suit is within the mischief of Art. 3 of Sch. III, Bihar Tenancy Act. In my opinion, the learned Additional District Judge has completely misdirected himself in coming to that conclusion. Article 3 of Sch. III, Bihar Tenancy Act, in terms applies to a suit "to recover possession of land claimed by the plaintiff as a raiyat or an under-raiyat." If this is a suit by a raiyat to recover possession of the land as such, the decision of the learned Additional District Judge may be right. But, on the face of the facts as stated above, it cannot be said that this is a suit by a raiyat to recover possession of the land as against his landlord. The plaintiffs in terms sue for recovery of possession on the ground that they have been dispossessed by the defendants as a result of the proceedings under S. 145, Criminal P. C. But the finding of the lower appellate Court is that the dispossession took place not after the judgment in the case in 1938 but that it took place as a result of the delivery of possession given in July 1933, to the auction-purchaser. In the first place, the decision of the Full Bench of this Court in 9 Pat. 788[2] would directly apply to the facts of this case, even assuming that this was a suit by a raiyat as such. If the lower appellate Court had found as contended by the plaintiffs that the dispossession took place after the decision of the S. 145 case, the Full Bench ruling of this Court, referred to above, may not have applied to this case. But, on the findings arrived at by the lower appellate Court that the dispossession took place as a result of the delivery of possession, given through Court to the auction-purchaser, the decision of the Division Bench of this Court, referred to above, is out of the way. In that case the dispossession was not as a result of delivery of possession through Court but as a result of the landlord dispossessing the raiyat taking advantage of a criminal case in which the raiyat had been convicted and sent to jail. But in my opinion, neither of the two cases is strictly in point so far as the facts and circumstances of this case are concerned. As already indicated, this is not a suit by a raiyat against his landlord to recover possession of his raiyati interest; this is a suit by a mortgagee in possession from the original raiyat. The defendants dispossessed the plaintiffs, according to the findings of the Courts below, as a result of the delivery of possession through Court after the auction-purchase in execution of the decree for rent. To such a case, the provisions of Art. 3 of Sch. III, Bihar Tenancy Act, are wholly inapplicable. Mr. L. K. Jha, who followed Mr. Lal Narayan Sinha, has not been able to place any decision before us to the effect that a mortgagee from the raiyat is within the mischief of this article. It must, therefore, be held that this is an ordinary suit by a mortgagee in possession, seeking recovery of possession of a portion of the mortgaged property against persons who have dispossessed them without any right. To such a suit, the general rule of limitation laid down in the Limitation Act must apply, and, as found by the Courts below, applying that general rule, the suit is within time.

[5] As the only ground on which the decision of the Courts below has gone against the plaintiffs is erroneous in law, the suit must be decreed with costs throughout. The appeal is accordingly allowed, and the judgment and decree of the Courts below set aside.

**Mahabir Prasad J.** — I agree.

D.S. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 391** *[C. N. 136.]*

RAY J.

*Harnandan Singh and others — Appellants* v. *S. M. Ramananddi Kuer — Respondent.*

A.F.A.D. No. 714 of 1946, Decided on 10-10-1947, from decision of Sub-Judge, Patna, D/- 15-1-1946.

Limitation Act (1908), Art. 142—Suit for possession on ground of dispossession — Plaintiff has to prove that he was dispossessed on alleged date or was in possession within 12 years of suit — Evidence of both parties as to possession unworthy of credit—Suit must fail as presumption arising on proof of title cannot be called in aid in such case.

Where a suit is brought for possession and ejectment of the defendant on the ground that the plaintiff was

dispossessed on certain date, the onus lies on the plaintiff to prove not only that he had title and antecedent possession but also that he was dispossessed on the alleged date or on any other date within 12 years of the institution of the suit. The latter alternative arises only when the plaintiff fails to prove dispossession by the defendant on the date alleged. In such a case when the plaintiff is allowed to succeed, and for that purpose to save the limitation by proof of possession within 12 years of the suit, he is in fact allowed to prove a case of discontinuance of possession rather than dispossession. It would be more a question of rule of pleadings and fairness of the trial rather than a question of law to determine whether the plaintiff should be permitted to take a stand on an alternative provided by law but not pleaded by him. In a suit for ejectment if it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit, the plaintiff's suit must fail inasmuch as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given : *Case law referred.* [Paras 4, 8]

Annotation : ('42-Com.) Lim. Act, Arts. 142 and 144, N. 87.

*Cases referred* :—

1. ('21) 6 P. L. J. 478 : 8 A. I. R, 1921 Pat. 237 : 62 I. C. 1 (F. B.), Raja Shiva Prasad Singh v. Hira Singh.
2. ('89) 16 Cal. 473 : 16 I. A. 23 : 5 Sar. 321 (P. C.), Mohim Chunder v. Mohesh Chunder.
3. ('31) 60 M. L. J. 430 : 18 A. I. R. 1931 Mad. 282 : 130 I. C. 845, Sevugan Chetty v. Kannappa Chetty.
4. ('22) 67 I. C. 673 : 9 A. I. R. 1922 Cal. 557, Rakhal Chandra v. Durga Das.
5. ('24) 3 Pat. 258 : 11 A. I. R. 1924 Pat. 629 : 81 I. C. 669, Ramnath v. Gobardhan.
6. ('22) 3 P. L. T. 460 : 9 A. I. R. 1922 Pat. 432 : 2 Pat. 1 : 67 I. C. 631, Tian Sahu v. Mulchand Sahu.

*B. C. De and C. P. Sinha* — for Appellants.

*Baldeva Sahay and Bindeshwari Prasad Sinha* — for Respondent.

**Judgment.**—This is a defendants' second appeal in a suit instituted by plaintiff 1, the admitted proprietor of the land, and plaintiff 2, settled under plaintiff 1 from the year 1938, for declaration of title to and recovery of possession of a piece of homestead land bearing plot No. 594 khata No. 73 in Qila Mahi Khandak tauzi No. 11088 within the limits of the Bihar Municipality. In the record of rights the plot is recorded as gairmazrua malik. The plaintiffs trace the cause of action for their suit to their dispossession from the land in suit on account of the warning notice and several acts of possession exercised by the defendant-appellants, such as, planting of bamboos, cutting of neem tree and appropriating the same, storing bricks thereon and carrying away stones and khowa that were on the land, to their house. With these allegations the reliefs prayed for are that it may be adjudicated that the land in dispute constituted the interest of plaintiff 2 by virtue of settlement, and that the plaintiffs always remained in possession and occupation thereof, that the defendants had no title to the land in dispute, that neither the defendants nor their ancestors ever came into possession thereof in any capacity, that the possession of the defendants over the land in dispute is wrongful, that plaintiff 2 may be put in possession by ejecting the defendants therefrom, that if for any reason there may be difficulty in passing a decree in favour of plaintiff 2, a decree for recovery of possession may be awarded in favour of plaintiff 1 and that a decree for damages of Rs. 5 in favour of plaintiff 2 being the price of stones and khowa and Rs. 10 being the price of neem tree cut and appropriated by the defendants be granted. The date of dispossession as stated in the plaint para. 22 is the 26th March 1941 the date of notice of the order under S. 144, Criminal P. C., and possession of defendant 1 over the property in suit.

[2] The defendant-appellants resisted the suit on the ground that they have been in possession of the land in dispute from the 29th Asarh 1317 Fasli when a hukumnama was granted by Babu Alakh Prakash Singh alias Babu Rashbihari Singh, an ancestor of plaintiff 1, to the father of defendant 1 and that since then neither the plaintiffs nor their predecessors-in-interest were in possession of the same. They thus urged that the plaintiffs' suit was barred by limitation having been brought on 26th March 1941, more than 12 years after the date of the hukumnama.

[3] The trial Court disposed of the suit disallowing the claim of plaintiff 2 on the finding : "Plaintiff 2 has not taken a valid settlement of the land and is not entitled to any relief" and decreed the suit in favour of plaintiff 1 only, for recovery of possession by eviction of the defendants with the modification that the claim for damages was disallowed. Plaintiff 2 did not agitate against the order of dismissal of his suit which order, therefore, is final for the purpose of this litigation as between the contending parties. The defendants preferred an appeal against the decree passed by the trial Court.

[4] Both the Courts have held that the plaintiff has proved his title but not the defendant-appellants, they having failed to prove the alleged settlement by Alakh Prakash. The only issues the decisions on which have been controverted in this appeal are :

"(1) Is the suit barred by limitation?

(5) Are the plaintiffs entitled to recover possession of the land in suit."

Issue No. 5 presents no difficulty in view of establishment of the plaintiff's title which is an accomplished fact according to the conclusions reached by both the Courts below. Plaintiff 1 will be entitled to recover possession in case her suit be held as in time. The question of limitation, therefore, looms large in this appeal and has to be determined. There is no dispute that the

suit is governed by Art. 142, Limitation Act which reads:

| | | |
|---|---|---|
| "For possession of immovable property when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession. | 12 years | The date of dispossession or discontinuance." |

There can be no manner of doubt that the plaintiff has to establish that her suit is in time; in other words, her suit is within 12 years from the date of her dispossession or discontinuance of possession on her part. As this is self-evident that according to the averments of the plaint the cause of action for the suit took place on the date the plaintiffs were dispossessed by the defendants, the question of discontinuance of possession does not arise for consideration. The finding that is expected in such a suit, of the final Court of fact, is in regard to whether the alleged dispossession has taken place either on the date assigned or on any other date within 12 years of the institution of the suit. Approached from this angle of vision, there need be no difficulty in applying the law to the facts of this case. In order to find that the alleged dispossession took place on 26th March 1941, two facts have to be determined by all means: One is that the dispossession imputed to the defendants did take place on the date alleged; secondly, that the plaintiffs were in possession till then. Alternatively, the requirements of law will be satisfied if it is found that the plaintiffs were in possession till some time within 12 years of the suit. The latter alternative arises only when the plaintiff fails to prove dispossession by the defendant on the date alleged. In such a case when the plaintiff is allowed to succeed, and for that purpose to save the limitation by proof of possession within 12 years of the suit, he is in fact allowed to prove a case of discontinuance of possession rather than dispossession. It would be more a question of rule of pleadings and fairness of the trial rather than a question of law to determine whether the plaintiff should be permitted to take a stand on an alternative provided by law but not pleaded by him. Though in some cases the difference between discontinuance of possession and dispossession may be reduced to a vanishing point but it is a distinction well discernible. To envisage a concrete case, discontinuance of possession may arise when a defendant asserting either title in himself or its absence in the plaintiff successfully deters the latter from exercising his acts of possession. Dispossession occurs only when somebody exercises acts of possession adverse to the plaintiff.

[5] Keeping this aspect of the question in view, it becomes immaterial for consideration whether a judgment in which there is neither a clear finding of dispossession within 12 years nor of discontinuance of possession within the same period does effectively and satisfactorily dispose of the issue. The answer to this question must be in the negative.

[6] I shall now quote a few passages from the judgment of the learned lower appellate Court in order to bring into relief his mode of disposal of the issue. While dealing with the question of title set up by the defendant, the Court observes:

"The evidence of possession over this parti (fallow) land which is still fallow as was seen by the learned Munsif will be dealt with in the next issue and it would appear that evidence of possession alone is not such from which an inference of permanent settlement could be drawn in favour of the defendant. I, therefore, find that appellant had failed to prove that his father obtained permanent settlement of the land in suit from Babu Alakh Singh."

He formulated the next point in the following words:

"Whether the appellants are in possession of the disputed land for 12 years before the suit and had thereby acquired right by adverse possession when the suit was brought?"

This formulation clearly evinces manifestly a wrong approach to the case. This approach has necessarily vitiated his examination of the evidence as to possession adduced by the parties respectively. The result that he reached on an examination of both sides' evidence is summarised in the following words:

"Reading the oral evidence of both sides it appears that no overt act of possession was exercised on the disputed land by any party except the construction of chabutra prior to S. 144, Criminal P. C., proceedings and the land otherwise was uncultivated waste. Though appellant's witness says that appellant constructed it, appellant's version is that it was existing from before. There is no definite evidence of the appellant having constructed the same. On the other hand plaintiff claims to have constructed it after plaintiff 2 took settlement by registered patta and kabuliat and shortly before S. 144, Criminal P. C. proceedings."

It has been contended by Mr. Baldeva Sahay, counsel for the respondent, that the last sentence of the passage quoted above occurring, as it does, after an expression of opinion as to unreliable character of the defendant-appellant's evidence as to construction of a chabutra necessarily imports that what the Court decided was that the plaintiff's claim of construction of a chabutra was substantiated. I cannot, however, accede to this contention inasmuch as such an inference is thoroughly well negatived by the sentence that immediately follows, namely:

"The only reliable evidence among all the witnesses examined by both parties is of P. W. 1 who was Deputy Inspector of Schools and has since retired."

This sentence evidently connotes that no other evidence adduced by the plaintiff was held reliable. The position deducible, therefore, is that if P. W. 1 has spoken about the construction of a chabutra by the plaintiff, it would amount to a

finding in favour of the plaintiff but not otherwise. While referring to what P. W. 1 deposed, the learned Court of appeal below says:

"In 1940 he (P. W. 1) was occupying a house adjoining the disputed land. Because the disputed land was parti he used to sit on the land occasionally under the neem tree and has seen plaintiff Binod Bihari in possession of the parti land, the only overt act of possession exercised by Binod Bihari was that he used to tie his cow on the land."

In order to ascribe to this passage the effect of a finding as to possession in favour of the plaintiff it has to be seen whether the learned Court of appeal below himself considered the tying of cow on the land as an overt act of possession. It should be remembered that the Court has said in the passage already referred to:

"Reading the oral evidence of both sides it appears that no overt act of possession was exercised on the disputed land by any party except the construction of chabutra. . ."

It is clear, therefore, that he finds no possession in favour of the plaintiff. The operative part of the learned lower appellate Court's final conclusion appears in the following words:

"I, therefore, find that the appellant failed to prove that he was ever in possession of the land for 12 years prior to S. 144, Criminal P. C. proceedings. The learned Munsif was justified in decreeing the suit in favour of the plaintiffs."

This, what can be called culmination of his judgment, indicates that he has dealt with the case as if it was one falling within the purview of Art. 144, Limitation Act, but from his statement of the case from the pleadings, which I have already noticed, it is clear that the case is one which is governed for the purpose of limitation by Art. 142, Limitation Act.

[7] If any part of his judgment can be so interpreted as to deal with the case from an angle of vision compatible with applicability of Art. 142 rather than of Art. 144, it is this:

"The gairmazrua land lying open and waste land should be deemed in possession of the proprietor unless the person claiming it proves his exercise, right and actual act of possession over the same which the defendant failed to do."

Assuming but not accepting as correct that this was the way in which the question of limitation was sought to be disposed of in favour of the plaintiff by the Court of Appeal below, I should say that his mode of approach was thoroughly wrong.

[8] I should refer to the decision in 6 P. L. J. 478,[1] in which relying upon a passage from the judgment of their Lordships of the Privy Council in 16 Cal. 473,[2]

"In all actions for ejectment where the defendants are admittedly in possession . . . and under a claim of title it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title and it is the opinion of their Lordships that in this case the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed and at some time within 12 years before the commencement of the suit. . . and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed,"

it was held that in a suit in ejectment, the plaintiff must not only prove his title but also that he has been in possession within 12 years from the date of the institution of the suit. If it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit, the plaintiff's suit must fail inasmuch as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. In this view of the matter, the plaintiff's suit can be dismissed in view of the learned lower appellate Court's finding that the evidence adduced by both sides is unworthy of credit. But to adopt this course would amount to upholding a wrong done by the lower appellate Court in his appreciation of the law applicable to the case. He will have to be told what should be the right approach to the case, and granting a proper approach what is the point on which a finding is needed for satisfactory disposal of the issue as between the parties. I should, therefore, remit this case back to the lower appellate Court to come to a finding whether the plaintiff has discharged the onus that lay upon him to prove not only that he had title and antecedent possession but also that he has been in possession within 12 years from the date of the institution of the suit. There is always an exception to this rule in cases where possession is not capable of proof by acts of actual user. I cannot do better than quote a passage from the judgment of Sir Dawson-Miller C. J. in the above referred to Full Bench case to define the exception. The passage runs as follows :

"Possession, however, is not always capable of proof by acts of actual use, and the absence of evidence of user in the case of submerged or jungle waste lands does not necessarily raise a presumption against the plaintiff's continued possession where antecedent title and possession are proved, and in such cases it has been held that the continuance of possession may be presumed if antecedent title and possession are proved."

I must further point out that this exception is a case of "discontinuance of possession" contemplated in Art. 142. I have already said that the rule of pleadings and fair and square deal to the defendant in the trial of a case should come into play in determining whether the plaintiff will be allowed to succeed on a case of discontinuance of possession while he made a case of dispossession. Even if a case of discontinuance of possession be acceded to him, he will have to prove specifically how and by what act of the defendant and when the discontinuance of possession took place.

[9] With regard to the rule of pleading of which I have made reference more than once in the earlier part of my judgment, I will refer to two cases cited at the Bar. One of them is the case in 60 M. L. J. 430[3] where it had been said :

"If the plaintiff puts forward a case of effective possession and adduces evidence in support of it, as the plaintiffs have done in this case, then he cannot give up that case and rely upon any presumption in support of his possession, because the special case set up by him is inconsistent with any such presumption."

The next case cited, in this behalf, is 67 I. C. 673[4] in which occurs the following passage :

"Where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where, having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it."

I should, therefore, ask the Court of appeal below to see that no new case is sprung up upon the defendant at the stage of appeal. In all fairness to the respondent, the attention of the Court below should also be drawn to the decision of this Court in 3 Pat. 258.[5] In this case Sir Dawson-Miller C. J. who delivered the leading judgment in the Full Bench case in 6 P. L. J. 478[1] had to deal with a case in which the evidence adduced by the plaintiff and the defendant was weak particularly in reference to the nature of the land concerned. His Lordship at p. 265 of the report referring to another decision of his said :

"It was, therefore, clearly laid down that not only in cases where the evidence was strong on both sides but in cases where the evidence is such as might be believed but is also weak, in both cases the Court having a difficulty in arriving at a satisfactory conclusion of where the truth lies may take into consideration the presumption arising from title as well as the other probabilities in the case. If, therefore, the learned Judge, from whose decision this appeal is brought, was of opinion that the presumption arising from title could not be called in aid in cases where the evidence is weak, but nevertheless credible, I must respectfully decline to agree with his view of the matter as it appears to me to be contrary entirely to the view taken in the case 3 P. L. T. 460[6] last cited."

[10] In the view that I have taken, I do not think it necessary for me to go through the evidence in order to decide whether I should remand the case or dispose of it finally. In view of the wrong approach on the part of the lower appellate Court, I consider it necessary that the case must go back to him for rehearing and disposal in accordance with law bearing in mind the observations hereinbefore made.

[11] The appeal is, therefore, allowed, the case is remitted back to the lower appellate Court, and the costs should abide the result.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 395** *[C. N. 137.]*

AGARWALA AG. C. J. AND MANOHAR LALL J.

*The Province of Bihar—Petitioner* v. *Rani Bhubneshwari Kuer—Assessee.*

Misc. Judl. Case No. 85 of 1945, Decided on 11-9-1947.

(a) Bihar Agricultural Income-tax Act (7 [VII] of 1938), Ss. 2 (m) and 3—Board of trustees is 'person' and liable to tax.

Where a person has created a trust in respect of his estate vesting the estate in the Board of Trustees, the object being the liquidation of the settlor's debt and payment of allowance to dependents and for religious purposes, the Board of Trustees is a 'person' within the meaning of S. 2 (m) and as such is liable to be charged for income-tax on its agricultural income for the year previous to the year of assessment. [Para 2]

(b) Bihar Agricultural Income-tax Act (7 [VII] of 1938), Ss. 11 and 2 (a) — Assessee owner of two estates *A* and *B*—Trust created in respect of estate *B* for payment of debts—Estate *B* vested in Board of Trustees—Income of estate *B* held, was not agricultural income of assessee—Assessee, held entitled to have income from *A* estate assessed separately from *B* estate — Rate applicable to income from *A* estate, ascertaining of.

The assessee *R* was the owner of two estates *A* and *B*. In respect of the estate *B*, he created a trust vesting the entire estate in the Board of Trustees. of which he himself was a member. The objects of the trust were (1) to liquidate *R's* debts; (2) to pay allowances to dependents; and (3) to pay allowances for religious public purposes. In the assessment year *R* as a settlor-trustee made a return for the agricultural income of *B* estate. He also made a return of the income derived by him from estate *A*. The income-tax officer proceeded to levy on the assessee an assessment based on the amalgamation of the income of both the estates:

*Held* that (i) the income from the trust estate was assessable in the hands of the Board of Trustees and not otherwise. The Board of Trustees was entitled under S. 11, to have the income from estate *B* separately assessed from income derived by *R* from estate *A* and *R* was also entitled to have his income from estate *A* assessed separately from the income from estate *B*. [Para 2]

(ii) The income of the trust properties which was applicable to the liquidation of *R's* debts could not be regarded as his income falling within the meaning of the agricultural income as defined in S. 2 (a): 22 A. I. R. 1935 P. C. 143, *Rel. on.* [Para 3]

(iii) that for the purposes of ascertaining the rate applicable to the assesse's income from estate *A* the income-tax authorities were not entitled to add to that income the income from estate *B*. [Para 2]

*Cases referred:*—

1. ('35) 62 I. A. 207 : 22 A. I. R. 1935 P. C. 143 : 14 Pat. 552 : 156 I. C. 856 (P. C.), Gopal Saran Narain Singh v. Commr. of Income-tax, B. & O.
2. (1884-90) 2 Tax Cas. 25, Ex parte Mersey Docks and Harbour Board.

*Government Advocate*, — for the Province of Bihar.
*Baldeva Sahay and Shyamnandan Prasad Singh* — for Assessee.

**Agarwala Ag. C. J.** — This is a reference by the Board of Revenue under S. 25, Bihar Agricultural Income-tax Act, 1938, in respect of an assessment for the year 1943-44. The material facts are that the assessee Rani Bhubneshwari Kuer was the owner of two properties which may conveniently be referred to as the Tikari estate and the Amawan estate. In 1941 in respect of the Tikari estate she created a trust, vesting the entire estate in a Board of Trustees, of which she herself is a member. This deed of trust was subsequently amended in 1942. Broadly speaking, the objects of the trust were: (a) to liquidate the Rani's debts; (b) to pay certain allowances to dependents; and (c) to make certain allowances for religious and public purposes. In the year with which we are concerned the Rani as settlor-trustee made a return of the income of the trust estate to the Agricultural Income-tax officer of Ranchi, who assessed the income of the estate at Rs. 2,90,748, and the tax payable at Rs. 39,372-2-0. The Rani also made a return of the income she derived from the Amawan estate to the Agricultural Income-tax Officer of the Patna Circle, showing her income from that estate as Rs. 29,589-5-3. The Agricultural Income-tax Officer, Patna Circle, sent this return to the Agricultural Income-tax Officer at Ranchi, who then proceeded under S. 26 to levy on the assessee an assessment based on the amalgamation of the income from both estates. The questions which have been formulated by the Board for our decision in this state of affairs are so worded as not to express clearly the matters in dispute between the assessee and the Income-tax Department. The parties have agreed in this Court that the matters on which they are at issue should be formulated thus: first, whether the assessee is entitled to have the income of the Amawan estate assessed separately from the income of the Tikari estate; and, secondly, whether for the purpose of ascertaining the rate applicable to the assessee's income from the Amawan estate the Income-tax authorities are entitled to add to that income the income from the Tikari estate.

[2] Section 3 of the Act, which is the charging section of the Act, provides that agricultural income shall be charged on the total agricultural income of the previous year of every person. "Person" is defined in S. 2 (m) as meaning any individual or association of individuals owning or holding property for himself or for any other, or partly for his own benefit and partly for another, either as owner, trustee, receiver, common manager, administrator or executor, or in any capacity recognised by law, and includes an undivided Hindu family, firm or company. A Board of Trustee is, therefore, a person within the meaning of this Act, and as such is liable to be charged for income-tax on its agricultural income for the year previous to the year of assessment. Omitting the words not relevant for the present purpose, S. 11 (1) of the Act provides that if a person holds land from which agricultural income is derived partly for his own benefit and partly for the benefit of beneficiaries, or wholly for the benefit of beneficiaries, the agricultural income shall be assessed on the total agricultural income derived from such land at the rate which would have been applicable if such person had held the land exclusively for his own benefit and the agricultural income-tax so payable shall be assessed on the person holding such land, and he shall be liable to pay the same. So far as the Tikari estate is concerned, it is held by the Board of Trustees, and the income therefrom is declared by this section to be taxable in the hands of the Board. The second sub-section to S. 11 provides that any person holding such land shall be entitled, before paying to any beneficiary the amount of agricultural income which such beneficiary is entitled to receive from agricultural income derived from such land, to deduct the amount of agricultural income-tax at the rate at which the agricultural income is or will be assessed under sub-s. (1). There is no dispute in this case about the genuineness of the deed of trust executed by the Rani which has vested the Tikari estate in the Board of Trustees for the purposes set out in the trust. In view of the clear provisions of S. 11 of the Act, the income from this trust estate is assessable in the hands of the Board of Trustees and not otherwise. On the other hand, the income derived from the Amawan estate is assessable only in the hands of the Rani. There is no justification, therefore, for supposing that there is any basis for the view taken by the department that the income of these two estates may be assessed at one assessment. The Board of Trustees are entitled under S. 11 to have the income from their estate separately assessed from the income which the Rani derives from her Amawan estate, and the Rani herself is entitled to have the income from her Amawan estate assessed separately from the income which the Board of Trustees derives from the Tikari estate. The first question must, therefore, be answered in the affirmative.

[3] On behalf of the income-tax authorities, it has been contended that in so far as the income derived from the trust properties is applicable, under the terms of the trust, to the liquidation of the Rani's debts, it should be regarded in law as her income and assessable if she had received

it direct. The language of the charging section, however, does not justify this conclusion. That section, as I have already shown, provides that agricultural income shall be charged on the total agricultural income of the assessee. Reduced to its simplest form, therefore, the question that has to be decided is whether assessment of such part of the income of the trust properties as is applicable under the terms of the trust to the liquidation of the Rani's debts is agricultural income within the meaning of the Act. Section 2 (a) of the Act defines agricultural income as (1) any rent or income derived from land which is used for agricultural purposes and is either assessed to land revenue in Bihar or subject to a local rate assessed and collected by officers of the Crown as such; (2) any income derived from such land by (i) agriculture, or (ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or (iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii). If that part of the income of the trustee which is applicable to the discharge of the Rani's debts is to be regarded as her income, it still remains for consideration whether it falls within the meaning of agricultural income as defined in S. 2 (a) of the Act. Regarded thus, it appears to me plain that the Rani does not receive it as income derived from rent of land used for agricultural purposes, or by reason of the land being used for the purposes mentioned in sub-cl. (ii) of the definition. She receives it constructively, if she receives it at all, by reason of the terms of the deed of trust providing for the application of part of the trust income to the liquidation of her debts. In this view I am supported by the decision of their Lordships of the Privy Council in 62 I. A. 207.[1] That was a case under the Indian Income-tax Act of 1922, which exempted from assessment under that Act all agricultural income. The definition of agricultural income for the purposes of that Act is precisely the same as the definition of agricultural income in the Act now under consideration. The facts of the case were that N transferred an estate to B in consideration of (a) the payment of a lump sum, (b) the discharge of certain debts, and (c) the payment to him for life of an annuity of Rs. 2,40,000. By a separate deed the payment of the annuity was made a charge on the lands transferred. The taxing authorities included the annuity in A's assessable income, and the question that arose for decision was whether N was entitled to have the annuity excluded from the assessment on the ground that it was agricultural income which was exempted from taxation under the provisions of the Act. The Privy Council held that the annuity was not agricultural income within the meaning of the Act, but money payable under a contract imposing a personal liability the discharge of which was secured by a charge on land. I am, therefore, of the opinion that the second question must be answered in the negative.

[4] The reference is answered accordingly. The assessee is entitled to the costs of this hearing which is assessed at Rs. 250.

[5] **Manohar Lall J.** — I agree. I cannot understand how a trustee can be taxed in one assessment not only on the income which is derived from the trust estate, of which he is in possession as a trustee, but also on his individual income which has nothing to do with the income of the trust estate. It was sought to be argued on behalf of the department that the trust is nothing more than a device to pay off the debts of the Rani and that we should hold that the income in the previous year was the income of the Rani from the fact that the trustees have applied it to pay off the debts of the Rani. This argument would have been sound if it could be held that the trust was void and invalid. Trust is defined by S. 3, Trusts Act of 1882, and our attention has been drawn to no provision of the Act which would compel us to hold that this particular trust was invalid. On the other hand S. 4 enacts that a trust may be created for any lawful purpose and nothing can be more lawful than the payment of one's own debts. Illustration (c) to S. 4 appears to contemplate a trust like the present; the trust appears to be *bona fide* as an important creditor like the Bank of Bihar was entitled to nominate a member on the Board of Trustees. The argument that the Rani should be taken to be recipient of this income in the previous year on account of the payment of the debts by the trustee ignores the decision of the celebrated House of Lords' case in (1884-90) 2 Tax Cas. 25[2] where it was pointed out that the mode of the application of the income has nothing to do with the question as to when and by whom the profits have been received and that the tax attaches itself as soon as the income is received. In the present case, therefore, the tax became payable as soon as the trustees received the income, and the subsequent allocation would not amount to a receipt of the same income by the Rani through the creditors. I also notice that the department has been taxing the trust in the past and also in the present year by accepting the position that the trust has derived the assessable income, the trust has been assessed

by the Income-tax Officer, Gaya. The statement of the case and the orders of the Income-tax Officer and Assistant Commissioner proceeded on the view that a valid trust exists.

S.C. *Answer accordingly.*

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**A. I. R. (35) 1948 Patna 398** *[C. N. 138.]*

MANOHAR LALL AND MUKHARJI JJ.

*Benares Bank Ltd.* — *Appellant* v. *Sashi-bhushan Misra*—*Respondent.*

A. F. O. O. No. 71 of 1946, Decided on 30-4-1947, from order of Sub-Judge, First Court, Monghyr, D/-14-11-1945.

(a) Evidence Act (1872), S. 138 — Practice of forcing litigant to examine adversary's witness.

On the failure of the party's examining his witnesses, the practice of forcing opposite party to examine him and thus depriving him of the advantage of cross-examining him condemned. [Para 8]

Annotation.— ('46-Man.) Evidence Act, Ss. 137 and 138, N. 3 and 7.

(b) Companies Act (1913), S. 171—Applicability—Company in liquidation obtaining decree — Sale in execution—Application by auction-purchaser to set aside sale—Leave of Court is not necessary.

Section 171 does not apply to appeals or applications by unsuccessful parties to a litigation brought by a company. [Para 12]

Hence, where an application is made by an auction-purchaser to set aside the sale held in execution of a decree obtained by a company in liquidation, on the ground that the judgment-debtor had no saleable interest in the property sold at the date of the sale, no sanction of the Court as contemplated by S. 171 is required as such an application is a defensive application: 5 A.I.R. 1918 Lah. 181 (F.B.), *Foll.*; *Case law relied on.* 28 A.I.R. 1941 All. 154, *Dissent.* [Para 16 & 20]

Annotation:—('46-Man.) Companies Act, S. 171, N. 4.

*Cases referred* : —

1. ('41) 28 A. I. R. 1941 All. 154 : I. L. R. (1941) All. 175 : 194 I. C. 57, Rawat Rajkumar v. Benares Bank Ltd.
2. ('18) 47 I. C. 392 : 5 A. I. R. 1918 Lah. 181 : 62 P. R. 1918 (FB), Kishen Singh v. Industrial Bank of India.
3. ('37) 24 A.I.R. 1937 Lah. 926 : 176 I. C. 206, Jiwan Das v. Peoples Bank of Northern India.
4. ('38) 25 A.I.R. 1938 Lah. 754 : 179 I. C. 376, Simla Banking and Industrial Co., Ltd., Lahore v. Indo Swiss Trading Co. Ltd. Calcutta.
5. (1901) 85 L.T. 141, Humber v. John Griffiths Cycle Co.
6. ('32) 59 I. A. 283 : 19 A. I. R. 1932 P. C. 165 : 60 Cal. 1 : 137 I. C. 529 (P.C.), Nagendra Nath Dey v. Suresh Chandra Dey.
7. ('41) 28 A.I.R. 1941 Lah. 392 : I.L.R. (1941) Lah. 760 : 197 I. C. 1 (F.B.), Shukantla v. Peoples Bank of Northern India.
8. (1894) 3 Ch. 376, Hood Barrs v. Cathcast.
9. (1897) 1897 A. C. 177 : 66 L. J. Q. B. 356 : 76 L. T. 299 : 45 W. R. 507, Hood Barrs v. Heriot.
10. ('08) 35 I. A. 22 : 35 Cal. 202 (P.C.), Phul Kumari v. Ghansham Misra.
11. ('41) 28 A.I.R. 1941 All. 335 : I. L. R. (1941) All. 565 : 196 I. C. 274, Maharaj Kishore Khanna v. Benares Bank.

*S. K. Mitra and U. N. Sinha* — for Appellant.

*Lalnarain Sinha and K. K. Sinha*—for Respondent.

**Manohar Lall J.**—This is an appeal by the decree-holder, the Benares Bank, Ltd., (in liquidation)—who is aggrieved by the order of the learned Subordinate Judge of first Court, Monghyr, dated 14-11-1945 by which he has held that the judgment-debtor has no saleable interest in the property which was purchased by the respondent and, therefore, has set aside the sale.

[2] The appellant having obtained a decree against the judgment-debtor in the Court of the Subordinate Judge at Bhagalpore got it transferred to Monghyr for execution and put up to sale the interest of the judgment-debtor in eight annas share in losts 1 and 2. The sale was actually held on 4-4-1944, and the respondent Sashi Bhushan Misra became the auction-purchaser for Rs. 5100. The sale was confirmed on 6-5-1944.

[3] On 3 11-1944 Sashi Bhushan Misra filed an application under O. 21, R. 91, Civil P. C., that the sale should be set aside upon the ground that the judgment-debtor had no saleable interest on the date of the sale. The reason for making the application beyond 30 days of the date of the sale was alleged to be that the petitioner was a resident of Darbhanga district and when he sent the rent to the landlord he was informed on 15-10-1944 that the name of the judgment-debtor was not recorded in the landlord's serishta, but the name of one Ambica Singh was recently mutated in place of the judgment-debtor by virtue of a kabala executed in June 1941 regarding lot No. 2 and that lot No. 1 had long ago been purchased by the Banailly Raj in execution of a rent decree and the same had been settled with Ambica Singh who had sold it to one Munshi Sahu. It will be observed that all these alleged transactions took place long before the date of the sale.

[4] It was also asserted in para. 3 of the application that the applicant was assured by lawyers and agent of the decree-holder that the properties actually belonged to the judgment-debtor and that acting on this fraudulent assurance the petitioner was kept out of knowledge of the fact that the judgment-debtor had no saleable interest in the property sold and, therefore, he could not make the application earlier.

[5] The real question in the case was a question of fact, namely, whether by reason of fraud and misrepresentation, the respondent was induced to purchase the property and that he discovered the defect in the title of the judgment-debtor only on 15-10-1944. Evidence was adduced on behalf of the applicant which consisted of Babu Bindeshwari Prasad Singh, an advocate, who is the brother-in-law of the auction-purchaser, of the tahsildar of the Banailly Raj, of the patwari of Babu Ugramohan Sao and of Babu Shree Krishna Misra, who was an advocate

on behalf of the decree-holders in the execution case.

[6] On behalf of the appellant the only witnesses examined were the civil Court peon, who merely reported as to the delivery of possession, and of Shambhu Nath, the molazim of the decree-holder.

[7] The learned Subordinate Judge on a consideration of the evidence has come to the conclusion that the auction-purchaser was led to purchase the property by fraud and misrepresentation on the part of the agent of the decree-holder—the property was purchased by Bindeshwari Prasad Singh in the name of Sashi Bhushan Misra.

[8] Having perused the evidence we agree with the view of the Subordinate Judge. The evidence of Shambhu Nath — who is the only witness on behalf of the decree holder — corroborates the case sought to be made out on behalf of the auction-purchaser. (After considering his evidence, his Lordship proceeded.) The learned Subordinate Judge was impressed with the evidence of Bindeshwari Babu and having perused his evidence we are of the opinion that he should be believed. He says definitely that he made enquiries from Babu Srikrishna Misser, the leading lawyer on behalf of the decree-holder and he was told that the properties belonged to the judgment-debtor and were free from encumbrance and he was further assured that Babu Srikrishna Misser had made an enquiry regarding the title of the judgment-debtor through Shambhu Nath karpardaz and Mr. Srivastava, the Law Superintendent of the decree-holder—the Law Superintendent of the decree-holder has not been examined. The applicant did not rely upon the onus of proof but actually examined Babu Srikrishna Misser, who should have been examined on behalf of the decree-holder, and thus he was deprived of the advantage of cross-examining him. This practice of forcing a litigant to examine the adversary's witness has been condemned by their Lordships of the Judicial Committee in many cases. But the evidence of this witness as it stands does not contradict the evidence of Babu Bindeshwari Prasad Singh. (His Lordship considered his evidence and then continued.) On these facts, I am satisfied that we should agree with the appreciation of the evidence by the learned Subordinate Judge.

[9] It was not argued before us that the judgment-debtor had saleable interest on the date of the sale, and, therefore, it is unnecessary to refer to the other evidence which supports the conclusion of the learned Subordinate Judge that the judgment-debtor had no saleable interest in the land sold on 4-4-1944.

[10] The learned Government-Advocate also took the objection, which was overruled by the learned Subordinate Judge, that the application for setting aside the sale was not maintainable in view of the provisions of S. 171, Companies Act. That section provides that :

"When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court . . . . ."

It is argued that as the leave of the Allahabad High Court was not obtained in the present case, the learned Subordinate Judge should not have entertained the application for setting aside the sale.

[11] The true scope and ambit of this section of the Companies Act has been the subject of contradictory decisions by the various High Courts. One view is that those proceedings which are in the nature of defensive proceedings to contest or defend a litigation started by a company in liquidation before or after it has gone into liquidation are not hit by the section. In accordance with this view, which commended itself to the learned Subordinate Judge, it has been held that an application like the present one, which was made in the course of the execution proceedings started by the Company in liquidation as decree-holder, does not require the sanction of the High Court. The opposite view may be illustrated by the decision of the Allahabad High Court in A. I. R. 1941 ALL. 154[1] that S. 171 is as much applicable to appeals by persons who have been unsuccessful in suits brought against them by companies as to original suits brought by such persons.

[12] I have examined a large number of cases which have clustered round this difficult question and am inclined to accept the view of the Lahore High Court that S. 171 does not apply to appeals or applications by unsuccessful parties to a litigation brought by a company.

[13] In the Full Bench case in 47 I. C. 392[2] it was expressly held that an application for revision arising out of an action brought by a company does not come within the purview of S. 171, Companies Act.

[14] In A. I. R. 1937 Lah. 926[3] it was held that when once an action by a company in liquidation has been proceeded with and is successful, there is no necessity for the defendant in the action to obtain leave for any defensive proceeding on their behalf, and the filing of an appeal was not held to be proceeding with or commencing any legal proceeding against the Company. The same view was adopted in A. I. R. 1938 Lah. 754.[4]

[15] The leading case which has always been taken as the guide is the case in (1901) 85 L. T.

141.[5] In that case Lord Davey in delivering the judgment of the Court observed :

"When once an action by the company itself has been proceeded with there is no necessity for the defendants in the action to obtain leave for any defensive proceedings on their behalf."

Braund J. attempted to distinguish the observation of Lord Davey upon the ground :

"In that case a company, John Griffiths Cycle Co., had in the first instance brought an action against the defendants prior to the winding up in which the company had been unsuccessful. The company then appealed to the Court of appeal and it was during the pendency of that appeal that the winding up order against the company was passed. In that appeal the company was eventually successful. Then the defendant to the suit who was the respondent to the appeal appealed to the House of Lords and it was in respect of that appeal to the House of Lords that the question arose whether the leave of the winding up Court was necessary .... In other words, Lord Davey said that inasmuch as the appeal which was pending at the date of the winding up order in that case was an appeal by the company itself and as such was one which needed no leave to prosecute it, it was a proceeding which might go on to its ultimate conclusion including an appeal to the House of Lords notwithstanding S. 87, Companies Act of 1862 which was the Act then in force."

With utmost respect, I am unable to agree. If it is once conceded, as it must be, that no leave of the company Judge is required to resist or defend a proceeding or a suit instituted by the company, why should an unsuccessful defendant or respondent be forced to ask for leave when he wishes to go to the higher Courts to have the order or judgment set aside ? An appeal is always treated as a continuation of the suit, and as there is no definition of the word "appeal" in the Civil Procedure Code or in the Companies Act, I would also hold that an application in revision to an appellate Court asking it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of the term : Sir Dinshaw Mulla in the Privy Council case in 59 I. A. 283[6] at p. 287. It will be also noticed that the appeal by the defendant to the House of Lords in (1901) 85 L.T. 141[5] was filed after the winding up of the company had been ordered during the pendency of the litigation and, therefore the defendant would have been forced to take the leave of the Court before he was allowed to appeal to the House of Lords were it not for the fact that he was merely appealing against an order which the company had successfully obtained against him from the lower appellate Court, that is to say he was merely taking a defensive action. I would respectfully dissent from the view expressed by Braund J.

[16] The matter may be looked at from another point of view which has been well expressed by Tek Chand J. in the later Full Bench case of the Lahore High Court in A. I. R. 1941 Lah. 392[7] where he points out that the terms of S. 171 are clear and imperative :

"They create an absolute bar against the commencement, or continuance, of a suit or other legal proceeding against the company except with the leave of the Court. Neither the word 'suit' nor the expression 'illegal proceeding' is, however, defined in the Companies Act, the Civil Procedure Code or the General Clauses Act. They have different meanings in different statutes according to the context, but there is no doubt as to their meaning in S. 171. As stated in S. 26, Civil P. C. a 'suit' is a proceeding under the Code, which is instituted with the presentation of a plaint in a Court of original jurisdiction and it is in this sense that this word is used here. The expression 'legal proceeding' in this section is coupled with 'suit' and obviously means proceedings *ejusdem generis*, that is to say, original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from an interlocutory or final order passed in the suit. The rule of interpretation to be followed in such cases is contained in the maxim *copulatio verborum indicat acceptationem in eodem sensu* (the coupling of words shows that they are to be understood in the same sense.) Reference may, in this connection be made to (1894) 3 Ch. 376[8] affirmed on appeal by the House of Lords in (1897) A. C. 177[9] in which a similar provision in the (English) Married Women's Property Act, 56 and 57 Vict., c. 63, S. 2, was so interpreted."

Applying this reasoning to the facts of the present case, I would observe that the company itself started the execution proceeding and, therefore, the judgment-debtor was entitled to raise objections to the execution of the decree and to have the sale set aside without the previous sanction of the High Court of Allahabad. Indeed this position has not been questioned before us. Now, if the judgment-debtor can make proper application without the sanction of the High Court, all persons who are entitled to have the sale set aside by a proper proceeding, e. g. under O. 21, R. 89 or O. 21, R. 90, or O. 21, R. 91, Civil P. C., must also be held entitled to do so without obtaining leave of that Court. It may be suggested that the auction-purchaser was not resisting the execution of the decree, but the auction-purchaser is a representative of the judgment-debtor and is expressly authorised under R. 91 to apply to the executing Court to have the sale set aside. This application has to be made within 30 days of the date of the sale but before its confirmation, and, this application has to be made during the continuance of the execution proceedings started by the Company. This application; can be truly called a defensive application the auction-purchaser wants to safeguard his interest by seeking the aid of the executing Court that he should not be defrauded and deprived of his money which he has deposited by offering the bid for the property; in the circumstances alleged he gets no title on the completion of the sale.

[17] As a contrast attention may be drawn to the above noticed decision of the Lahore High Court in A. I. R. 1941 Lah. 392[7] where it was held that a suit under O. 21, R. 63, Civil P. C., could not be instituted without the leave of the High Court against the company for a declaration of title of the plaintiff—the reason being that it was not a defensive proceeding, but was an independent suit brought on a proper plaint on a court-fee in a different Court. It may be open to argument that the decision of their Lordships of the Judicial Committee in the well-known case in 35 I. A. 22 : 35 Cal. 202[10] having held that a suit under O. 21, R. 63 was a mere continuation or review of the proceedings under O. 21, R. 58, Civil P. C., the institution of a suit by an unsuccessful objector may well be held to be a continuation of the defensive proceedings. But it is unnecessary to decide the correctness of the view taken by the Lahore High Court as to this special situation, I am only drawing attention to it to show that the Lahore High Court has pointed out that if the proceeding in question could be held to be a defensive proceeding, no leave of the High Court was necessary under S. 171, Companies Act. They held that the leave of the High Court was necessary as such a suit could not be held to be a defensive proceeding.

[18] Finally, I desire to say that the Legislature could not have intended that before a litigation is finally disposed of any aggrieved party, who has a right to move the same Court before the proceedings are terminated there, should be made to rush up to the Company Judge to obtain his leave to make an application for reliefs available to him under the statute. The period of limitation, it will also be observed, for such an application is a short one, that is to say 30 days from the date of the sale. It can easily be contemplated that in many cases it may be difficult to obtain an order from the High Court within such a short period. In A. I. R. 1941 ALL. 335[11] Braund J. refused to grant leave to continue the appeal where the appeal had been filed within time but the application for the grant of leave was made after the time had expired. This is an illustration of the harshness of the view which commended itself to the learned Judge and also supports me in taking the opposite view that this could not have been the intention of the Legislature in framing S. 171. I am, therefore, free to construe the relevant words of S. 171 in their natural plain meaning which accords with justice and convenience of practice.

[19] For these reasons, I am of opinion that the learned Subordinate Judge was right in overruling this objection of the decree-holder. The result is that the appeal must be dismissed. But in the circumstances I would direct that each party should bear his own costs of these proceedings both here and in the Court below.

[20] **Mukharji J.**—I agree. The application made by the auction-purchaser to have the sale set aside on the ground that the judgment-debtors had no saleable interest in the land did not require any leave of the Court such as is contemplated by S. 171, Companies Act. The miscellaneous case to which the application gave rise could not be called a suit; nor was it a legal proceeding of the nature of a suit. Further, as pointed out by my learned brother, it was a defensive proceeding. The auction-purchaser had to pay 25 per cent. of the purchase-money when the property was knocked down to him. Under O. 21, R. 85, Civil P. C., he had to pay the balance within a certain period. His case was that he bid at the sale on the fraudulent misrepresentation made to him on behalf of the decree-holder and he wanted back the money which he had paid in Court under O. 21, R. 84 and O. 21, R. 85, Civil P. C. In the circumstances of the case no leave of the Court appears necessary under S. 171, Companies Act. The appeal is fit to be dismissed.

S.C. *Appeal dismissed.*



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**A. I. R. (35) 1948 Patna 401** *[C. N. 139.]*

IMAM AND NARAYAN JJ.

*Badri Prasad and others — Petitioners* v. *The King.*

Criminal Misc. No. 57 of 1948, Decided on 13-4-1948.

**Bihar Maintenance of Public Order Act (5 [V] of 1947), S. 4 — Supplying ground of detention "as soon as may be" means within reasonable time—Order under S. 2 (1) (a) served on 17th February 1948— Grounds communicated on 13th March 1948 —Period held not unreasonable.**

No specific period is laid down within which grounds for detention have to be communicated to a detenu under S. 4. The phrase "as soon as may be" used in S. 4, means as early as is reasonable in the circumstances of the particular case. What is reasonable in one set of circumstances may be quite unreasonable in another.

The date of the Provincial Government's order under S. 2 (1) (a) was 17th February 1948, and the grounds for the detention were served on the detenu on 13th March 1948, that is to say within a month from the date of the order:

*Held*, that the period could not be described as unreasonable: 35 A. I. R. 1948 Pat. 135 (F.B.), *Rel. on.* [Para 3]

*Case referred*:—

1. ('48) 35 A. I. R. 1948 Pat. 135 : 26 Pat. 628 : 49 Cr. L. J. 132 (F. B.), Murat Patwa v. Province of Bihar.

*Rajkishore Prasad* — for Petitioners.

*The Government Advocate* — for the Crown.

**Imam J.**— The District Magistrate of Monghyr has forwarded eleven applications by ele-

ven persons described as Habeaus Corpus applications to this Court for consideration. A rule was issued by this Court on the District Magistrate on 23rd March 1948. In the letter which the District Magistrate wrote to the Registrar of this Court forwarding the eleven applications, he indicated that out of the eleven applicants, applicant No. 3, Chandar Sahu, son of Dashu Sahu of Asarganj, police station Tarapur, and applicant No. 4, Fekan Sahu, son of Dasu Sahu of Asarganj, police station Tarapur, had been released after the expiry of fourteen days under his order. Further, the letter shows that applicant No. 11, Krishnadeo Murarka, son of Ranglal Murarka of Lalbagh, police station Sheikhpura, had been released under the orders of the Government revoking their order of detention. The rule issued by this Court has now been heard, and the letter, showing cause, of the District Magistrate to this Court through the Registrar shows that out of eleven persons, nine have been released in various circumstances. Two of the applicants, namely No. 6, Ram Ratan Gupta, son of Ramjiwan Lal of Sadar Bazar, Jamalpur, and No. 9, Bajolal Sharma, son of Kokai Sharma of Walipur, police station Jamalpur, continue to be detained under the orders of the Provincial Government. It follows, therefore, that we are largely concerned with considering the cases of these two persons, who are still in detention, and not the cases of the other applicants since they have been released.

[2] It is necessary, however, to mention the case of Chander Sahu, son of Dasu Sahu of Asarganj, police station Tarapur. There can be no doubt that he was released by the District Magistrate on the expiry of 14 days of the order passed by him under S. 2 (2), Bihar Maintenance of Public Order Act 1947 (Bihar Act 5 [V] of 1947), hereinafter referred to as the Act. The papers placed before us by the Government Advocate, however, show that against this individual the Provincial Government has passed an order, order No. 9117C dated 17th March 1948, for his detention under S. 2 (1) (a) of the Act. In this connection, the Government Advocate has also placed before us a letter received from the Secretary to Government in which it is stated that Chander Sahu was automatically released on the expiry of the District Magistrate's detention order. Subsequently, Government ordered his detention on 7th March 1948 and the Government have no information yet whether Chander Sahu has been arrested. It seems to me that the application of Chander Sahu was not with reference to this detention order as his application is dated 19th February 1948.

[3] It remains to consider the cases of Ramratan Gupta and Bajo Lal Sharma. The former was arrested on 5th February 1948, under the provisions of S. 151, Criminal P. C. He was detained in the Monghyr jail by the orders of the District Magistrate passed under S. 2 (2) of the Act, which order was served upon him on 13th February 1948. The Provincial Government by order No. 1772C dated 17th February 1948, passed under S. 2 (1) (a) of the Act, directed his further detention. This order was served upon Ramratan Gupta on 16th March 1948, and the grounds on which the Government detained this petitioner were disclosed under order No. 8748C dated 11th March 1948, which was served upon the detenu on 13th March 1948. The question is whether his present detention is illegal. The decision of the Full Bench of this Court in A. I. R. 1948 Pat. 135[1] is the guiding authority for this Court in such matters. Mr. Rajkishore Prasad has argued that the grounds which were disclosed by Government order No. 8748C dated 11th March 1948, were served upon the petitioner on 13th March 1948, considerably more than a month after the date of his arrest, and therefore, according to the Full Bench decision of this Court, this service could not be said to be within reasonable time from the date of his arrest. The Full Bench, however, has not laid down, as it could not lay down any specific period within which the grounds for detention have to be communicated to a detenu under S. 4 of the Act. The following passage from the Full Bench decision may be quoted :

"We should arrive at exactly the same meaning by applying the ordinary rule of construction that where no time is mentioned for the doing of a thing a reasonable time is intended. We have no doubt, therefore, that the phrase 'as soon as may be' as used in S. 4 of the Act means as early as is reasonable in the circumstances of the particular case. Beyond saying that it should ordinarily be possible to communicate the grounds to a detenu within a comparatively short period of time and that after the lapse of such a period the onus will shift to the authority in question to show that the grounds were served as soon as was reasonable, we think it better not to indicate any particular period as being sufficient to shift the onus of proof. The circumstances will obviously differ to a substantial extent. What is reasonable in one set of circumstances may be quiet unreasonable in another."

In the Full Bench case it appears that against the applicant Murat Patwa, the order under S. 2 (1) (a) of the Act was issued on 16-4-1947, and the applicant was arrested on 9-5-1947, but the grounds for his detention were not communicated to him until 24-7-1947. In the opinion of this Court, it was abundantly clear in the circumstances that the authority concerned did not comply with the provisions of S. 4 of the Act. It will be noticed that in the Full Bench case the order passed under S. 2 (1) (a) was on 16-4-1947,

and the grounds under S. 4 were not communicated to the applicant until 24-7-1947, that is to say, something like more than three months afterwards. Under S. 3 of the Act an order passed by the Provincial Government remains in force for a period not exceeding six months from the date on which it is made unless earlier revoked by the authority making the order. It is unnecessary to refer to the proviso to this section. Now, it seems to me that where an order under S. 2 (1) (a) of the Act can be valid only for six months, it would be ridiculous to allow the authority concerned to serve upon the detenu the grounds for his detention more than three months after the date of the order. That would not be complying with S. 4 of the Act which says,

"as soon as may be after the order is made, the authority making the order shall communicate to the person affected thereby ..... the grounds on which the order has been made against him."

In the present case, the date of the Provincial Government's order under S. 2 (1) (a) of the Act is 17-2-1948, and the grounds for the applicant's detention were served on him on 13-3-1948, that is to say within a month from the date of the order. Although I am not prepared to lay down any hard and fast rule, I do not think that in the circumstances of this case, the period between the date of the Government order under S. 2 (1) (a) of the Act and the date on which the grounds for that order were served on 13-3-1948, is a period which can be described as unreasonable within which to have complied with the provisions of S. 4 of the Act.

[4] So far as the latter petitioner, Bajo Lal Sharma, is concerned, he was arrested on 5-2-1948, under S. 151, Criminal P. C. He was detained in the Monghyr Jail under S. 2 (2) of the Act, the order of the District Magistrate being served on him on 13-2-1948. The Provincial Government's order under S. 2 (1) (a) of the Act is numbered 1770C dated 17-2-1948. This was served upon the applicant on 16-3-1948, and the grounds for his detention as per order NO. 8748C dated 11-3-1948, was served upon him on 13-3-1948. His case appears to be exactly on the same footing as the case of Ramratan Gupta and must suffer the same fate as the application of that person.

[5] In my opinion, the circumstances do not justify the conclusion that there has been a breach of the provisions of the Act which would justify this Court in holding that these two applicants are under illegal detention.

[6] The application of all the eleven petitioners is, therefore, dismissed in the case of Ramratan Gupta and Bajo Lal Sharma on merits, and in the case of the other petitioners on the ground that so far as is known they are no longer under detention.

**Narayan J.**—I agree.

R.G.D. *Applications dismissed.*

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**A. I. R. (35) 1948 Patna 403** *[C. N. 140.]*

SINHA AND MAHABIR PRASAD JJ.

*Kumar Gope and others — Defendants— Appellants* v. *Jageshwar Prasad and others, Plaintiffs and another, Defendant — Respondents.*

A. F. A. D. No. 1074 of 1945, Decided on 29-1-1948, from decision of Sub-Judge, Begusarai, D/- 21st May 1945.

Bihar Tenancy Act (8 [VIII] of 1885), S. 112A— Application by tenant acting as karta of joint Hindu family for reduction of rent — Entire proprietary interest represented before revenue Courts but sudhbharnadar of one of proprietors not impleaded — Order passed by revenue Court is not rendered null and void on ground of absence of sudhbharnadar.

*A* and *B* were the proprietors of a holding. *C* who was a tenant acting as karta of joint Hindu family made an application under S. 112A for reduction of rent. To this proceeding *A* and *B* were impleaded but *D* who was a usufructuary mortgagee of *B* and was thus his sudhbharnadar was not impleaded as a landlord. Similarly, other members of *C's* family were not impleaded. Before the revenue Courts the plea that the proceedings were irregular in absence of sudhbharnadar was not taken by *A* and *B* and revenue Courts passed an order reducing the rent. *A* and *B* thereupon brought a suit for declaration that the orders of the revenue Court reducing the rent were *ultra vires* for the reason that the sudhbharnadar was not impleaded as landlord and that other members of *C's* family were not impleaded:

*Held* that the entire proprietary interest in the holding in question was represented before the revenue Courts, though a temporary landlord, namely the sudhbharnadar of *B* owning a moiety share in the proprietary interest, was not impleaded. That defect should not be allowed to render the entire proceedings nugatory, especially when the person adversely affected by that order who could challenge it on the ground that he was not a party to it, had not chosen to do so. [Para 8]

*Held further* that the defect of parties was not canvassed in the revenue Court which were not invited to adjudicate upon the alleged irregularity in so far as the sudhabharnadar was not a party to the proceedings. *A* and *B* who were parties to those proceedings, were not entitled to raise that question subsequently having failed to raise it before the competent Courts in those proceedings. [Para 8]

*Held also* that as *C* was the karta of the family, he could, in law, present the application to the revenue Courts on behalf of all the members and the application was not defective on the ground that the other members were not the applicants in the revenue Courts. [Para 9]

*Cases referred:*—

1. S. A. Nos. 57 and 84 of 1943, D/-17-2-1944, Arbinada Bandhu v. Hargauri Tewari.
2. *Reported in* ('48) 35 A. I. R. 1948 Pat. 224 : 26 Pat. 113, Arbinda Bandhu v. Hargauri Tewari.

*Sarjoo Prasad and Ramanugrah Prasad* — for Appellants.

*S. N. Bose, D. C. Varma and Girijanandan Prasad* —for Respondents.

**Sinha J.** — This is a defendants' second appeal from the decision of the learned Subordinate Judge of Begusarai reversing that of the Munsif of the same place in a suit for a declaration that the orders of the revenue Courts' reducing the rent of the holding under S. 112A, Bihar Tenancy Act, are a nullity, being *ultra vires*.

[2] The material facts leading up to this appeal are as follows: The plaintiffs are the proprietors of the holding in question which was, on the findings, constituted for the first time in 1919 at an annual rent of Rs. 84 after consolidating two holdings, one bearing an annual rent of Rs. 72 and another bearing an annual rent of Rs. 12. Harbhajan, who was the tenant of this reconstituted holding, died in 1935, leaving him surviving his two sons, defendants 1 and 2, and his grandson, defendant 3, son of defendant 1. Of the two plaintiffs, the second plaintiff has executed a usufructuary mortgage bond in favour of the defendant-second party for a term of years, ending with the close of the Fasli year 1349. Defendant 1 made an application for reduction of rent in 1939 on the ground that the holding had deteriorated in productive capacity. This application was made in the name of Harbhajan deceased, though, in fact, by defendant 1 himself. This was numbered as Case No. 756 of 1939. A subsequent application was filed by defendant 1, saying that Harbhajan was dead, and the applicant, defendant 1, had succeeded to the holding. It should be noted that the application had been made in Form No. 33, meant for an application under S. 112A (1) (c), Bihar Tenancy Act. No application for reduction under S. 112A (1) (d) in Form No. 34 was made. But the Rent Reduction Officer granted relief to the applicant under cl. (d) of the section by reducing the rent to Rs. 46-8-0. It should also be noted that the plaintiffs, that is to say, the proprietors, were impleaded in the rent reduction proceeding but not the sudhbharnadar, the defendant-second party. On appeal by the proprietors, the case was remanded for a fresh decision. After remand, a petition for amendment was made to the effect that the application should be deemed to have been made under cl. (d) of S. 112A (1), Bihar Tenancy Act. Even after remand, Form No. 34, meant for an application under cl. (d) of the section, was not used; but, ultimately, the orders of the Rent Reduction Officer reducing the rent to Rs. 46-8-0 were maintained by the appellate and the revisional Courts. It was in the revisional Court, before the learned Commissioner, that the plea of defect of parties on the ground that the sudhbharnadar had not been impleaded was raised for the first time. This plea was negatived on the ground that it had been raised too late.

[3] Two suits were filed, one being Title Suit No. 157 of 1943 against the tenant-defendants as first party and the sudhbharnadar as the defendant-second party, and another being Rent Suit No. 299 of 1933 for recovery of arrears of rent for the years 1346 to eight annas kist of 1350 Fasli. The rent suit was filed by the first plaintiff only; but, subsequently, defendant 7 in the suit, the sudhbharnadar, was transposed as a co-plaintiff. In the title suit, the plaintiffs claimed the declaration that the orders of the revenue Courts reducing the rent from Rs. 84 to rupees 46-8-0 were *ullra vires* for the reasons (1) that all the landlords had not been impleaded, inasmuch as the sudhbharnadar, the defendant-second party, had not been named as the landlord in the column meant for showing the names of the landlords of the holding; (2) that all the tenants had not been impleaded, inasmuch as the application had been made originally in the name of the deceased Harbhajan which was subsequently amended in the name of defendant 1 only; and (3) that the application as made by defendant 1 was in Form No. 33, meant for a case coming within the purview of cl. (c) of S. 112A (1), Bihar Tenancy Act, and that, therefore, the orders of the revenue Courts, purporting to have been made under the provisions of cl. (d) of that section, were a nullity.

[4] Both the suits were contested by the defendants, and they were heard together, as they related to the same holding. The tenant-defendants contended that the title suit for the declaration aforesaid was not maintainable for the reasons that the revenue Courts had exercised their final jurisdiction, and, as there was no want of jurisdiction in those Courts, the civil Court could not interfere with their orders. In the rent suit, it was pleaded by the defendants that they were liable only for the reduced rent.

[5] The trial Court dismissed the title suit, holding that the orders of the revenue Courts. reducing the rent of the holding, were not *ultra vires*, and decreed the suit for rent at the reduced rate in accordance with the orders of the revenue Courts.

[6] It should be noted that no appeal was filed from the decision of the trial Court in the rent suit; but an appeal was filed only in the title suit. On appeal, the learned Subordinate Judge came to the conclusion that the sudhbhanardar, the defendant-second party, respondent before him, was a necessary party to the rent reduction proceedings, and that, in his absence, the revenue Courts had no jurisdiction to entertain the application for reduction of rent. He also held that all the three tenants, namely, defendant 1, his brother, defendant 2, and his son, defendant 3, were also necessary parties,

and the absence of the two defendants from the proceedings rendered them null and void. Lastly, he held that the application before the revenue Courts, even after the amendment after remand as aforesaid, remained an application under cl. (c) of S. 112A (1), Bihar Tenancy Act, and, therefore, the revenue Courts had no jurisdiction to grant relief to the applicant under cl. (d) of that section. In the result, he decreed the suit, and reversed the decision of the trial Court, and gave a declaration that the orders of the Rent Reduction Officer reducing the rent of the holding were *ultra vires* and not binding on the appellants. Hence this second appeal by the defendants-first party.

[7] It should be noted at the outset that this case was first placed for hearing before a single Judge of this Court who referred it for hearing by a Division Bench. Before us, learned counsel for the appellants has contended that the lower appellate Court has misdirected itself in so far as it has held that, for the reasons given by it, the orders of the Rent Reduction Officer were *ultra vires*. The only question for determination in this appeal is whether the orders of the Rent Reduction Officer are *ultra vires*. It will be convenient to deal with the grounds of decision of the lower appellate Court separately.

[8] The lower appellate Court has held that the absence of the sudhbharnadar, who is the defendant-second party in this suit, vitiated the entire proceedings in the revenue Courts. It should be noted that this is not a suit by the sudhbharnadar for a declaration that the rent reduction proceedings and the orders made therein were not binding upon him. Though he was impleaded as a defendant in the suit, he did not ask for being transposed to the category of a plaintiff. If he had instituted a suit for a declaration that the orders of the Rent Reduction Officer were not binding upon him, the position may have been different. But the plaintiffs were certainly parties to the rent reduction proceedings. They did not challenge the authority of the revenue Courts to pass the orders which they did in the absence of the sudhbhanadar. It cannot be gainsaid that the orders of the revenue Courts reducing the rent of the holding are not binding on the sudhbharnadar. Even after the dismissal of his suit for arrears of rent at the original rate of rent, he did not choose to challenge that decision by filing an appeal. Hence, so far as he is concerned, the decision in the rent suit is final, at least for the period for which the rent suit had been instituted. For aught we know, his sudhbharna interest has ceased, as the period of the mortgage, according to the stipulation in the deed, was to expire in 1349 Fasli, and that may have been the reason why he did not choose to appeal from the adverse decision in the rent suit. So far as the plaintiffs are concerned, they were parties to the rent reduction proceedings, and, in my opinion, they are bound by the result of those proceedings. It has been rightly argued on behalf of the plaintiff-respondents that the rent of a holding is one, and, if it is the original rate of rent so far as the sudhbharnadar is concerned, it cannot be the reduced rate of rent as against the plaintiffs. In this connexion, the remarks of Manohar Lall J. in S. A. NOS. 57 and 84 of 1943,[1] to the following effect are relevant:

"It remains to consider the argument that the 4 annas cosharer landlords were not impleaded at all and, therefore, the order reducing the rent of the entire holding was not binding upon the cosharer-landlords who have appeared. Apart from the remarks which I have already made, it is enough to state that the learned Munsif has pointed out that the 12 annas cosharer-landlords could easily have taken the plea that the four annas cosharers had not been impleaded, and secondly he asked the question what is there to show that the agent of the four annas cosharer-landlords was not present watching those proceedings, and then he answers the question by saying that he must have been doing so, and, therefore, Ex. C was issued. I am further of opinion that the absence of the four annas cosharer-landlords would amount at the utmost to a defect of parties. The order may or may not be binding on these four annas cosharer landlords, but it is certainly binding on the 12 annas cosharer landlords, who are appellants before me."

It appears that there were Letters Patent appeals from the decision of Manohar Lall J., being L. P. A. NOS. 4 and 5 of 1944.[2] From the judgment of the Court in the Letters Patent appeals, it would appear that this part of the judgment of Manohar Lall J., was not assailed. It cannot be said that the Revenue Courts had no initial jurisdiction to hear the matter. Defect of parties is not such an irregularity as to affect the jurisdiction of the Court seized with initial jurisdiction to render the judgment which can be assailed collaterally. The entire proprietary interest in the holding in question was represented before the revenue Courts, though a temporary landlord, namely, the sudhbharnadar of the second plaintiff owning a moiety share in the proprietary interest, was not impleaded. That defect, in my opinion, should not be allowed to render the entire proceedings nugatory, especially when the person adversely affected by that order, who could challenge it on the ground that he was not a party to it, has not chosen to do so. As already stated, this is not a suit by the sudhbharnadar. It is not one of those cases where it could have been said that the entire proprietary interest in the holding had not been represented before the revenue Courts. Whether the tenant-defendants were or were not aware of the existence of the sudhbharna is a matter which should not detain us, though the

lower Courts appear to have devoted some space to this controversy. In my opinion, the landlords' interest was sufficiently represented before revenue Courts to give them jurisdiction to entertain the application for reduction of rent, and the absence of the sudhbharnadar from those proceedings does not render the order passed in those proceedings null and void. As already indicated, this defect of parties was not canvassed in the revenue Courts, except before the Commissioner who had no jurisdiction in the matter. The Courts, namely, the original and the appellate Courts, which dealt with the rent reduction proceedings were not invited to adjudicate upon the alleged irregularity in so far as the sudhbharnadar was not a party to the proceedings. The plaintiffs, who were parties to those proceedings, are not entitled to raise that question, having failed to raise it before the competent Courts in those proceedings.

[9] The second ground on which the learned Subordinate Judge has held against the appellants is that defendants 2 and 3 were not applicants before the revenue Courts. It is apparent, on the findings, that all the defendants-first party are members of a joint Hindu Mitakshara family, and that defendant 1, who figured as the applicant in the revenue Courts, is the karta of the family. There cannot be the least doubt that the application made by defendant 1 in the revenue Courts was made in the interest of the family as a whole, which he could in fact and in law represent, and the ultimate result of those proceedings has certainly been for the benefit of all of them. If defendant 1 was the karta of the family, he could, in law, present the application to the revenue Courts on behalf of all the defendants, and, in my opinion, the lower appellate Court has erred in holding that the application was defective on the ground that defendants 2 and 3 were not the applicants in the revenue Courts. The lower appellate Court has pointed out that, in the written statement filed in the suit, it was not alleged by the defendants that defendant 1 had filed the application in a representative capacity on behalf of the entire family. But it was not absolutely essential that it should have been so pleaded. The fact that defendant 1 is the karta of the family rendered the proceedings entirely regular. Defendants 2 and 3 have not challenged, and cannot challenge, the legality of those proceedings.

[10] Lastly, the lower appellate Court has observed that the revenue Courts had no jurisdiction to grant relief to the applicant under cl. (d) of S. 112A (1), Bihar Tenancy Act, when the application had been made under cl. (c) of that section. This ground of decision has not been sought to be supported by learned counsel for the respondents. It is manifest that such a ground is wholly ineffective on the question of jurisdiction of the revenue Courts. In this connexion it may be stated that this very ground had been successfully urged by the proprietors in the appellate Court which remanded the case for a fresh decision in accordance with law. After remand, the Rent Reduction Officer allowed the proceedings to be amended, and the applicant prayed that his application might be dealt as having been made under cl. (d) of that section. The revenue Courts had jurisdiction to allow the amendment of the proceedings, and, that jurisdiction having been exercised, it is not open to be challenged in a collateral proceeding. The revenue Courts may have acted wrongly, though that is by no means clear, in allowing the amendment; but that is not a question which is open to the plaintiffs in this suit.

[11] As all the grounds upon which the lower appellate Court has decreed the suit are, in my opinion, wholly inadequate to affect the jurisdiction of the revenue Courts, the decision of the lower appellate Court must be set aside, and that of the trial Court restored with costs throughout.

**Mahabir Prasad J.**—I agree.

D.S. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 406** *[C. N. 141.]*

AGARWALA C. J.

*Kameshwar Lal*— *Petitioner* **v.** *The King.*

Criminal Revn. Petn. No. 135 of 1948, Decided on 7-4-1948, against order of Addl. Sessions Judge, Gaya, D/- 17-1-1948.

**Evidence Act (1872), S. 114 — Failure to reply to written notice — Adverse inference drawn.**

In a complaint of an offence under S. 406, Penal Code, in respect of certain documents alleged to have been entrusted to the accused, the defence was that the accused had returned the documents to the complainant. But it was found that though the complainant had sent a written notice to the accused demanding a return of the documents, the accused had not sent any reply to the notice and he gave no explanation of his conduct:

*Held*, that under the circumstances an adverse inference was correctly drawn against the accused. [Para 1]

*Rajkishore Prasad* — for Petitioner.

*Tribeni Narain Sinha* — for Opposite Party.

**Order.**— The petitioner has been sentenced to pay a fine of Rs. 300 on conviction for an offence under S. 406, Penal Code. The facts are that a rent suit was instituted against Uttim Gorain. The latter, in support of his defence in that suit, entrusted the petitioner, who is a pleader's clerk, with three unregistered sale deeds to be filed in Court. The documents were filed and, after the suit was disposed of the Court returned the documents to the petitioner on the implied understanding that they were to

be delivered to Uttim Gorain. The latter, however, filed a complaint stating that they had not been delivered to him, inspite of a written notice being sent to the petitioner, to which he received no reply. The defence of the petitioner was that he had in fact returned the documents to Uttim Gorain. The sole question that arose for decision, therefore, was whether this defence was true, or whether the allegation of Uttim Gorain that the documents had not been returned to him was true. On a consideration of the evidence the Courts below have accepted the case for the prosecution. It has been found that there was no bad feeling between the petitioner and Uttim Gorain, which might serve as a foundation for finding that Uttim Gorain had falsely charged the petitioner with misappropriation of the documents. Further more, when Uttim Gorain sent a written notice to the petitioner to return the documents, the petitioner instead of replying that they had already been returned which is what one would expect if that had been the case, sent no reply at all, and has given no explanation of his conduct in that behalf. In these circumstances, I am not prepared to hold that the inference drawn by the Courts below adverse to the petitioner is incorrect and I would accordingly discharge this rule.

V.B.B. *Rule discharged.*

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**A. I. R. (35) 1948 Patna 407** *[C. N. 142.]*

SHEARER J.

*Santi Lal and others — Appellants* v. *Jogendra Nath Gorain — Respondent.*

A. F. A. D. No. 432 of 1947, Decided on 20-2-1948, from decision of Sub-Judge, Dhanbad, D/-25-1-1947.

**Transfer of Property Act (1882), S. 110 (f) — Acceptance of fresh lease during continuance of earlier lease—Implied surrender of original lease — Held on construction of two leases that on execution of a later lease earlier lease was surrendered.**

When during the continuance of a demise, a lessee accepts a fresh lease, this operates in law as a surrender of the original lease.

A co-sharer landlord executed a lease of a portion of land in a village in favour of *H* at an annual rent of Rs. 7-7-0. The lessee was granted both underground and surface rights in the soil and was entitled to certain trees growing on it. Subsequently, the whole body of co-sharer landlords executed a lease of the entire village to *H* and *J* at an annual rent of Rs. 160 in respect of the underground rights and Rs. 13-4-0 in respect of the surface rights. Out of the rent of Rs. 160 reserved in respect of the underground rights Rs. 50 were to be paid to the co-sharer landlord who had executed the first lease :

*Held* that the intention of the parties was that the earlier lease should cease to be operative and should be replaced by the subsequent lease. This was apparent from the fact that the rent reserved by the earlier lease ceased to be paid. Hence the rights of the parties were governed by the terms of the subsequent lease. [Para 1]

**Annotation : ('45-Com.) T. P. Act, S. 111, N. 10, Pt. 3.**

*Lala Atul Chandra Dutta* — for Appellants.

*S. C. Mazumdar* — for Respondent.

**Shearer J.** — The question that arises in this second appeal is as to the proper construction and effect of two leases, one executed in 1891 by Jairam Lala and the other executed two years later, in 1893, by the entire body of cosharer landlords, of whom Jairam Lala was one. The property demised under the second lease was the entire mauza Patrakuli. Both the surface and underground rights were conveyed, and it was stipulated that, in respect of each, separate rentals should be payable, namely, Rs. 13-4-0 for the surface rights, and Rs. 160 for the underground rights. Under the terms of the lease, the lessees were entitled to surrender the underground rights while retaining the surface rights. The property demised by the earlier deed executed by Jairam Lala alone was an area of 238 bighas situated in the southern portion of mauza Patrakuli. The rent payable under this lease was Rs. 7-7-0 annually, and both surface and underground rights were granted to the lessee Haradhan Gorain. There was an express provision that the lessee was entitled to "the fruit-bearing and non-fruit-bearing sal, mahul and palas trees etc., which exist at present or which may grow in future on the surface." Now, in the subsequent deed there was an express reservation of "jackfruit, mango, mahul and palas trees." At the commencement of the lease there was, however, a clause, which has been described as a ratification clause, and it is contended that, by reason of it, Haradhan Gorain and his successors-in-interest retained a right to all trees situated in the 238 bighas covered by the earlier lease. The lower appellate Court took the view that the subsequent lease should be regarded as a lease of the rest of mauza Patrakuli, excluding the 238 bighas covered by the earlier lease. There are, however, obvious difficulties in putting this construction on the document, for one thing, it purports, on the face of it, to be a demise of the entire mauza and not of a portion of it. Then, the subsequent lease was in favour of two persons, Haradhan Gorain and Jagarnath Gorain, while the earlier lease was in favour of Haradhan Gorain alone. Again, in the subsequent lease it was stated that out of the rent of Rs. 160 reserved in respect of the underground rights, Rs. 50 was to be paid to Jairam Lala, this being in excess of the amount to which he was strictly entitled. It is, I think, clear from this that the intention of the parties was that the earlier lease should cease to be operative and should be replaced by the subsequent lease, and that this was so is shown by the fact that the rent reserved by the earlier lease apparently ceased to be paid. When during

the continuance of demise, a lessee accepts a fresh lease, this operates in law as a surrender of the original lease. In Foa on Landlord and Tenant, Edn. 6, at p. 695, it is stated :

"The reason why this operates as a surrender is that the lessee, by accepting the new lease, has been party to an act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if the first lease continued to exist; and as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former."

The clause in the subsequent lease which has given rise to the difficulty has been translated thus :

"That it is a fact that Jairam Lala is the guardian of us, the mukarrari grantors. Previous to this, on taking our consent, he settled with you the surface and subsoil right in the joint property in the said mauza constituting his share therein under 3 *Khos* kebalas and the said settlement still remains in force on him and us and I, Jairam Lala and we shall have no right to interfere in the said matter."

This clause, and, indeed, the whole document, was obviously drawn up by someone who had no real knowledge of conveyancing. When it is remembered that Haradhan Gorain had been in possession of a portion of the mauza for some two years, this clause can be best understood as amounting to a ratification by the cosharer landlords other than Jairam Lala of what Jairam Lala had done. Jairam Lala would seem to have been one of several co-owners and not the managing member of a joint family, and the indications are that in granting the earlier lease he probably exceeded his powers. By reason of this clause in the subsequent lease the earlier lease may have been rendered a valid lease, but by operation of law, the moment before the subsequent lease was signed there was a surrender of the earlier lease. In consequence the rights of the parties depend wholly on what is contained in the subsequent lease. For these reasons, I would allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court.

K.S. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 408** *[C. N. 143.]*

MANOHAR LALL AND RAMASWAMI JJ.

*Badri Narain Jha and others*—*Appellants* v. *Raghunandan Jha and others* — *Respondents.*

A. F. A. D. No. 792 of 1946, Decided on 21-1-1948, from decision of Addl. District Judge, Darbhanga, D/- 9-4-1946.

**Limitation Act (1908), Arts. 142 and 144 — Suit for declaration and possesaion of land covered by bamboo clump—Title found with plaintiff—Defendant on one occasion, a few days before suit, cutting bamboos — Plaintiff held entitled to decree on ground that possession followed title.**

**The plaintiff brought a suit for declaration of his title to certain land covered by a bamboo clump and for recovery of possession. The Court found the title to the land with the plaintiff and it was also found that the defendant had on one occasion only cut the bamboos from the clum a few days before the suit. The trial Court decreed the suit but the appellate Court dismissed the suit on the ground that plaintiff had not proved his possession within 12 years of the suit :**

***Held* that having regard to the nature of the subject-matter of the dispute which was a bamboo clump which was not capable of possession every day or at a particular season of the year and the title having been found with the plaintiff he was entitled to the declaration and possession asked for. [Para 3]**

**Annotation : ('42-Com.) Lim. Act, Arts. 142 & 144, N. 15.**

*R. K. Choudhary* — for Appellants.

*Ramdeo Sinha* — for Respondents.

**Judgment.** — This appeal by the plaintiff arises out of a simple suit for declaration of title to and recovery of possession of 14 dhurs of land which on the findings appertain to plot No. 20.

[2] The Courts below have concurrently found that the title to plot No. 20 was with the plaintiff. But the appellate Court in disagreement with the trial Court dismissed the suit upon the ground that the plaintiff had not proved that he was in possession within twelve years of 28th January 1944, the date on which the suit was instituted. The trial Court had also given a decree in favour of the plaintiff for the price of 250 bamboos said to have been cut by the defendants, but this decree was also reversed in appeal. Hence the second appeal to this Court.

[3] It is argued on behalf of the appellants that having regard to the nature of the lands and the subject matter of the dispute namely the bamboo clump, the Court below was wrong in throwing the onus on the plaintiff and that it should have been held that in such a case possession follows title. We are satisfied on a perusal of the judgment of the learned Additional District Judge that he was wrong in upsetting the decree of the trial Court. As we have said above, the nature of the subject-matter of dispute was a bamboo clump and it was not capable of possession every day or even at a particular season every year. The only finding of the trial Court is that the defendants got the bamboos cut on 15th January 1944. But there is no finding of the appellate Court contrary to this point. Nor has he given any finding that the defendants ever appropriated the bamboos by either cutting them or selling them on any earlier date. In this state of the record, title having been found to be with the plaintiff, he was entitled to a decree for a declaration of title to and possession, of the area covered by the bamboo clump.

[4] The appellate Court did not give any finding on the value of the bamboos said to have been removed by the defendants. But having regard to the nature of the evidence given on

this point, we are not disposed to remand the appeal for rehearing as we are satisfied that the plaintiff has failed to prove that the defendants removed such a large number of bamboos on 15th January. Accordingly, the decree of the learned Additional District Judge will be affirmed with regard to the claim for the price of the bamboos, but in other respects the decree of the trial Court will be restored in so far as he declared the title of the plaintiff and awarded him possession of the disputed 14 dhurs of land. In the circumstances, the plaintiff will be entitled to half the costs.

K.S. *Decree modified.*

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**A. I. R. (35) 1948 Patna 409** *[C. N. 144.]*

SINHA AND MUKHARJI J.

*Prafulla Kumar Chakravarti*—*Petitioner* v. *Dhodha Sahani*—*Opposite Party.*

Criminal Revn. Appln. No. 407 of 1947, Decided on 8-10-1947, from decision of Sessions Judge, Muzaffarpur, D/-14-5-47.

**(a) Criminal P. C. (1898), S. 197—"Acting or purporting to act in the discharge of his official duty" —Complaint against Honorary Magistrate that he accepted bribe from accused before him on understanding that he would be acquitted—Prosecution under S. 161, Penal Code—Magistrate held was not acting but was purporting to act in discharge of his official duty—Sanction under S. 197 was held necessary—Penal Code (1860), S. 161.**

The main allegation in a complaint against *A* who was an Honorary Magistrate, was that one day prior to the date of delivery of judgment in the case in which the complainant was one of the accused, *A* took Rs. 400 on the understanding that the complainant would be acquitted. After making an enquiry the Magistrate ordered summons to be issued against *A* under S. 161, Penal Code. No sanction under S. 197, Criminal P. C., was obtained :

*Held*, that it could not be said that when the alleged bribe was taken *A* was acting in discharge of his official duty. But in the circumstances of the case it was clear that *A* was purporting to act in discharge of his duty when the alleged occurrence took place. Therefore, sanction under S. 197 was necessary. As no such sanction was obtained, the proceedings against *A* must be quashed: *Case law discussed.* [Para 10]

Annotation:—('46-Com) Cr. P. C., S. 197, N. 6.

**(b) Criminal P. C. (1898), S. 439—Question of fact—High Court can in fit case interfere on facts as well.**

No doubt the High Court rarely goes into facts in criminal revisions, but in a fit case the High Court would consider the facts as well. [Para 14]

Annotation:—('46-Com) Cr. P. C. S. 439, N. 15.

*Cases referred* :—

1. ('35) 14 Pat. 299 : 22 A. I. R. 1935 Pat. 52 : 155 I. C. 126 : 36 Cr. L. J. 650, Ram Singh v. S. A. Rizivi.
2. ('40) 21 P. L. T. 1085 : 27 A.I.R. 1940 Pat. 316 : 185 I. C. 738 : 41 Cr. L. J. 221, M. O. Angelo v. Kandan Manjhi.
3. ('39) 26 A. I. R. 1939 F. C. 43 : 1939 F.C.R. 159 : I. L. R. (1940) Lah. 400 : 181 I. C. 317 : 40 Cr. L. J. 468 (F. C.), Hori Ram Singh v. Emperor.
4. ('45) 46 Cr. L. J. 499 : 32 A. I. R. 1945 Pat. 136 : 23 Pat. 738 : 218 I. C. 409, Province of Bihar v. Rameshwar Prasad Singh.
5. ('35) 22 A. I. R. 1935 Rang. 263 : 13 Rang. 540 : 157 I. C. 1034 : 36 Cr. L. J. 1272 (F. B.), Emperor v. Maung Bo Maung.
6. ('47) 34 A.I.R. 1947 Cal. 290 : 228 I. C. 187: 48 Cr. L. J. 118, Harendra Chandra v. Emperor.
7. ('40) 27 A. I. R. 1940 Cal. 405 : I. L. R. (1940) 2 Cal. 162 : 190 I. C. 157 : 41 Cr. L. J. 854, Khurshid Ahmed v. Aman-ullah
8. ('44) 23 Pat. 517 : 31 A. I.R. 1944 F. C. 66 : I.L.R. (1944) Kar. F. C. 189 ; 214 I. C. 199 : 1944 F. C. R. 262 : 45 Cr. L. J. 755 (F. C.), Huntley v. Emperor.
9. Cri. Revn. No. 193 of 1944 (Pat), Sheokaran Lal v. Harihar Prasad.

*S. C. Chakravarty and Baldeo Sahay*—for Petitioner.

*K. P. Varma*—for Opposite Party.

**Mukharji J.**—This application in revision is on behalf of one Prafulla Kumar Chakravarty who was an Honorary Magistrate when the alleged occurrence took place. A few facts may be stated here for a proper appreciation of the points that have been raised. The petitioner as an Honorary Magistrate, had before him a case under Ss. 323 and 379, Penal Code. One Dhodha Sahani figured as one of the accused in this case. On 4th January 1947 this Dhodha Sahani filed a petition of complaint in the Court of the Sub-Divisional Magistrate making certain serious allegations against the petitioner. Dhodha Sahani's case was that the petitioner took from him a sum of Rs. 400/- on 22nd December 1946 promising to acquit him in the case pending against him. The case against the petitioner further was that the petitioner delivered judgment in the case on 23rd December 1946 convicting Dhodha Sahani and the other co-accused and sentencing each of them to pay a fine of Rs. 20/. The learned Sub-Divisional Magistrate examined Dhodha Sahani on solemn affirmation and directed the Second Officer to make an enquiry and submit his report. As the Second Officer was under the orders of transfer and it was thought that his successor in office might not be free for sometime, the enquiry was directed to be made by another Magistrate Mr. Sukhdeo Singh. The Magistrate who was asked to make the enquiry on the suggestion of the Second Officer, held an enquiry, examined witnesses and submitted his report. Among the witnesses examined by him were two persons one named Harnandan and the other Mukhlal. The enquiring Magistrate forwarded the statements of the witnesses to the Sub-Divisional Magistrate, but the statements of Harnandan and Mukhlal were not to be found in the record of the case. On 3rd Febuary 1947 the learned Sub-Divisional Magistrate ordered summons to be issued against the petitioner under S. 161, Penal Code. These are all the relevant facts of the case.

[2] It has been contended on behalf of the petitioner that the initiation of proceedings under S. 161, Penal Code, was bad in law inasmuch as no sanction, as required by S. 197, Criminal P. C., was obtained. Reliance has been placed on a number of rulings in support of the contention that the sanction contemplated under S. 197, Criminal P. C., is necessary in a case like this. The question of sanction under S. 197, Criminal P. C., has been discussed in a series of rulings of different High Courts. I must say that there is no unanimity of opinion in the matter. Even the same High Court has adopted different views at different times. Before I discuss the rulings I should like to refer to S. 197, Criminal P. C., itself. This section like many other sections of the same Code was amended in the year 1923. Before the amendment no Court could take cognizance of an offence committed by any Judge or any public servant if the Judge or public servant was accused as such Judge or public servant, without the sanction of appropriate authorities. The words "is accused as such Judge or public servant of any offence" gave rise to considerable difficulty in the matter of interpretation of the section in question. The section was recast by the amending Act of 1923. According to the provisions of the Code, as it stands at present, such sanction will be necessary where a Judge or a public servant "is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty." In the case with which we are concerned, it is contended that as the petitioner could not have committed the alleged offence if he was not an Honorary Magistrate, S. 197, Criminal P. C., has application and sanction is necessary.

[3] The scope of S. 197, Criminal P. C., was considered in 14 Pat. 299.[1] Their Lordships in this case observed that the obvious effect of the amendment of 1923 is that the scope of the protection intended for public servants has been widened. There is also an observation that the offence alleged, in order to attract the operation of S. 197 must be so connected with the official act as to form part of the same transaction. In 14 Pat. 299[1] the case was against a Deputy Magistrate who had been deputed to a certain place in connection with an official duty. He was to tackle the inhabitants of a village in the district of Monghyr. An additional police force had been stationed in the village and the Magistrate visited the village on this occasion to realise arrears of tax. Ram Singh who was one of the inhabitants of the village, apparently not one of the defaulters, happened to be present at the place where the Deputy Magistrate was. After finishing with the defaulters when the Magistrate turned round he noticed Ram Singh standing with his arms crossed on his chest. The Deputy Magistrate did not like the posture, and being irritated by the reply given by Ram Singh to his question as to why he was standing like that the Deputy Magistrate ordered his constables to make a *lathi* charge, and the result was that Ram Singh received certain injuries. It was clear in that case that when the alleged assault on Ram Singh took place the Deputy Magistrate was not acting or even purporting to act in the discharge of his official duty. His official duty was already over. Khaja Muhammad Noor and Luby JJ. held in this case that as hardly any time had elapsed between the performance of official duty and the alleged assault the two could be treated as forming part of the same transaction and sanction was necessary. The test laid down in 14 Pat. 299[1] as to when it can be said that the offence complained of was committed by a Judge or a public servant while acting or purporting to act in the discharge of his official duty may not apply with equal force to all cases. In fact, their Lordships who decided the case have observed at page 311 that each case must be decided on its own facts.

[4] The applicability or otherwise of the provisions of S. 197, Criminal P. C., also fell to be considered in another case of this Court. It is the case in 21 P. L. T. 1085.[2] The facts of this case are quite simple. Capt. Angelo was the Manager of a certain estate which was under the Court of Wards about the time of the alleged occurrence. It was said that in his capacity as the Manager he demanded among other things rice, fowls and one goat from one of the tenants of the estate of which he was the Manager. Such a demand has been made punishable under S. 63, Chota Nagpur Tenancy Act. A Division Bench of this Court held that sanction of the Provincial Government was necessary before Capt. Angelo could be prosecuted. The learned Chief Justice, who was a party to the decision, referred to the case in A. I. R. 1939 F. C. 43[3] and quoted the following few lines from the judgment of Varadachariar J.:

"In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it."

[5] Varadachariar J. also referred to another group of cases where much stress had been laid upon the circumstances that the official character or status of the accused gave him the opportunity to commit the offence and then remarked that it seemed to him that the first group of cases laid down the correct principle. After referring to the judgment of the Federal Court the learned Chief Justice at p. 1093 observed as

follows with reference to the case under consideration:

"In the present case, it is alleged, Capt. Angelo committed the act complained of in his official capacity, that is as agent of the landlord, and that being so, he committed an offence under S. 63, Chota Nagpur Tenancy Act. In my view the accusation in the present case is precisely the one contemplated in S. 197 (1), Criminal P. C."

[6] The question of sanction was considered by this Court in a more recent case. This is the case in 46 Cr. L. J. 499.[4] Rameshwar Prasad Singh, the accused in that case was an Assistant Price Control Officer. A chaprasi named Abdul Rauf complained to him that a certain shopkeeper had charged more than controlled price in respect of a certain commodity. The Assistant Price Control Officer went to the shopkeeper and threatened him and to have him to another place bound with a rope. The allegation further was that the officer promised to take no steps against the shop-keeper if a sum of Rs. 500 was paid to him. According to the prosecution, the Assistant Price Control Officer was paid a certain sum of money and this was recovered from the person of the particular officer. It was held by a Bench of this Court that no sanction was necessary. Their Lordships referred to S. 270, Government of India Act, 1935, which also affords protection to public servant against launching of prosecution for acts done or purporting to be done in execution of his duty as a servant of the Crown. The language of S. 197, Criminal P. C., and that of S. 270, Government of India Act, are not dissimilar from each other. Their Lordships in 46 Cr. L. J. 499[4] referred to certain observations made by Sulaiman J. in A. I. R. 1939 F. C. 43.[3] The real test in his Lordships opinion is not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty.

[7] The question of sanction under S. 197, Criminal P. C., was considered by a Full Bench of the Rangoon High Court in A. I. R. 1935 Rang. 263.[5] Maung Bo Maung was an Assistant Accountant at a certain Sub-treasury in Burma. The case against him was that he committed criminal breach of trust and was liable under S. 409, Penal Code. The first Additional Special Magistrate of Prome before whom Maung Bo Maung was prosecuted was of opinion that it was a case in which sanction under S. 197 of the Code was necessary. In this view of the matter, he passed an order that Maung Bo Maung "be released as far as this case is concerned." It would appear that it was argued before their Lordships of the Full Bench that sanction was necessary as Maung Bo Maung could not have committed the offence if he had not been a Government official. Their Lordships pointed out that although it is true that Maung Bo Maung could not have committed the offence but for his official position, in committing the alleged offence he was neither acting nor purporting to act in the discharge of his official duty. The judgment further goes on to say that in committing the alleged offence he was acting not as an official but as a thief. Dunkley J. in the same case explaining the words "purporting to act" observed that they connote that the public servant means or intends or purports to act as such, or that his action conveys to the mind of another that he is acting as such.

[8] Much stress has been laid on behalf of the petitioner on a very recent decision of the Calcutta High Court in A. I. R. (34) 1947 Cal. 290.[6] The facts of the case are briefly these: Harendra Chandra Barori was a Sub-Deputy Magistrate vested with powers of a Special Magistrate under Ordinance No. II of 1942. There was a case in his Court against Rai Bahadur Satyendra Kumar Das and Harendra Kumar Das. The case was one under the Defence of India Rules. In pursuance of a previous arrangement a sum of Rs. 10,000 was paid to the Special Magistrate to secure the acquittal of the two accused before him. The police party was lying in wait and it recovered the money soon after it had passed. The case against the Magistrate was under S. 161, Penal Code, and it ended in his conviction.

[9] In A. I. R. (34) 1947 Cal. 290[6] referred to in the preceding paragraph, a Division Bench of the Calcutta High Court held that prosecution for an offence under S. 161, Penal Code, does require the sanction of the Provincial Government under S. 197, Cr. P. C. Their Lordships observed that before the amendment of 1923, sanction was necessary in such a case and that the same is the law even after the amendment. In taking this view, their Lordships dissented from an earlier case of the same High Court reported in A. I. R. 1940 Cal. 405.[7] A careful perusal of the judgment of their Lordships of the Calcutta High Court in A. I. R. 1947 Cal. 290,[6] creates the impresssion that according to their Lordships an offence under S. 161, Penal Code, must require sanction because—(1) such a case required sanction prior to the amendment of 1923 and (2) there are indications that the intention of the Legislature in amending S. 197 was to increase the number of offences requiring sanction rather than to cut down their number. With great respect, I must say that I cannot entirely agree with their Lordships in the view that they have expressed. The intention behind

the amendment of 1923 of S. 197, Criminal P. C., is no doubt clear; it was to afford greater protection to Judges and public servants. This, however, can be no reason for a conclusion that a particular offence which required sanction before the amendment must also require it now. In interpreting any particular section we are to look to the actual words used. The words used in S. 197, Criminal P. C., as it stands after the amenment are not ambiguous. Therefore, in interpreting them we should not try to find out what the intention of the legislature was in introducing the amendment. The principle that is to be followed in a case like the present one has been explained in 23 Pat. 517.[8] No doubt their Lordships of the Federal Court in this case were considering the effect of S. 270, Constitution Act, but this will hardly make any difference because, as observed by Agarwala J. (as he then was) in 46 Cr. L. J. 499,[4] the language of S. 197 so far as the crucial words "while acting or purporting to act in the discharge of official duty" are concerned is not dissimilar from the language of S. 270, cl. (2), Government of India Act, 1935. Referring to the case in 1939 F. C. R. 159,[3] Zafrulla Khan J. in 23 Pat. 517[8] observed that the Federal Court had already laid down in A. I. R. 1939 F. C. 43[3] that to attract the provisions of S. 270, Constitution Act, it was not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant or taking advantage of his position as a public servant he did certain acts. The observations of his Lordship further are to the effect that to attract the provisions of the said section it must be established that the act complained of was an official act. Referring to the facts of the case before, him his Lordship then made the following remarks :

"In this case, the act complained of was the act of receiving illegal gratification. That surely could not be an act done or purporting to be done in the execution of duty."

[10] In the light of the rulings discussed above, I would once more refer to the facts of the present case. As already indicated above, the main allegation against the petitioner who was an Honorary Magistrate at the time of the occurrence is that one day prior to the date of delivery of judgment in the case in which the complainant was one of the accused, he (the petitioner) took Rs. 400 on the understanding that the complainant will be acquitted. In these circumstances, can it be said that when the petitioner took the money (if he took it at all) he was acting in the discharge of his official duty or was purporting to act in the discharge of such duty ? As an Honorary Magistrate the official duty of the petitioner so far as the particular case against the complainant was concerned was to try the case and either acquit or convict as might be warranted by the evidence adduced by the prosecution. According to the complainant the initiative came from the petitioner and the complainant went to the petitioner's house at his invitation. When the money passed hands (if it passed at all) the petitioner must have known that the act was a wrong one and that it had nothing to do with his official duty. In my opinion, it is absurd to say that when the alleged bribe was taken the petitioner was acting in discharge of his official duty. Then it is to be seen whether it is possible to say that the petitioner was purporting to act in discharge of his official duty. The words "purporting to act" in such a case may imply one of two things: that the person who purports to act was under a mistaken but honest belief, or that he pretended to act in a particular manner knowing full well that it was a mere pretence. In the present case it is impossible to say that when the alleged bribe was taken the petitioner was under an honest belief that while taking the bribe he was acting in discharge of his official duty. There can, however, be little doubt that when the petitioner, as alleged by the complainant, sent for the complainant and told him that he would give a judgment of acquittal if a sum of Rs. 600 was paid, he pretended to act in discharge of his official duty. If the case is a true one, there can be little doubt that this pretence was a successful one. Could the complainant have paid any money to the petitioner unless he felt certain about his acquittal at petitioner's hand ? No one is such a fool that he will part with good money unless he knows or believes that he will get something in return. In my opinion, the circumstances of the case make it sufficiently clear that the petitioner was purporting to act in discharge of his duty when the alleged occurrence took place. Therefore, sanction under S. 197, Criminal P. C., was necessary. As no such sanction was obtained, the proceedings against the petitioner must be quashed.

[11] It was also contended that although this is a criminal revision, the case is of such an extraordinary nature that the High Court should interfere on facts and quash the proceedings even if it is held in law that no sanction is necessary. In support of this contention a reference has been made to an unreported case of this Court, Cri. Revn. No. 193 of 1944.[9] Imam J. in the concluding portion of the judgment observed as follows:

"It is difficult to say that there was actually no material before the learned Sub-Divisional Officer for summoning the petitioner. But I am satisfied that the material was so hopeless that no reasonable Court would or could ever convict the petitioner for the offence alleged to have been committed by him."

[12] His Lordship next observed that it would be a denial of justice to the petitioner to subject him to the harassment, and possibly, degradation of a trial. The application was accordingly allowed and the proceedings were quashed. We have been asked to do the same thing in the present case. In the first place, attention has been drawn to the fact that the complaint was filed about a fortnight after the alleged occurrence and that the complainant is no other person than one of the accused whom the petitioner had convicted only a few days previously. The delay in filing the petition of complaint has been sought to be explained by the complainant. The explanation offered by him in his petition of complaint is that he paid several visits to the house of the petitioner to get the money back. From paragraph 8 of the petition of complaint it would appear that when the complainant asked for a refund of the money the petitioner told him that he had already shown the complainant favour inasmuch as instead of sending him to jail he had imposed only a fine. If one reads the statement made by the complainant on solemn affirmation before the Sub-Divisional Magistrate, one will find that according to the initial deposition of the complainant the petitioner gave no reply when he was asked to refund the money. There is yet one more vital discrepancy between the petition of complaint and the initial deposition. According to the petition of complaint (*vide* paragraph 3) when the petitioner demanded Rs. 600 as the price for a judgment of acquittal the complainant left his house saying that he would consult his men and approach the petitioner afterwards if money could be arranged. In his initial deposition the complainant made the statement that when a sum of Rs. 600 was demanded he (the complainant) agreed to pay Rs. 400 and promised to give on the following day.

[13] A grievance was also made on behalf of the petitioner that the petitioner did not have a fair deal at the hands of the Sub-Deputy Magistrate who made the enquiry in this case and recommended that the petitioner should be placed on trial. I think, this grievance is not an imaginary one. In the petition of complaint, the names of four witnesses have been mentioned. The witnesses are Mukhlal Singh, Jokhan Rout, Munga Rout and Harnandan Sah. The report of the enquiring Magistrate creates the impression on one's mind that before him Harnandan Sah and Mukhlal Singh were examined on behalf of the complainant. The record shows that on 21st January 1947, a petition was filed before the enquiring Magistrate on behalf of the complainant alleging that while the complainant was coming to Court with his witnesses, two of the witnesses, named Mukhlal Singh and Jokhan Rout, fled away under the influence of the petitioner. If Mukhlal Singh was not prepared to make a statement before the enquiring Magistrate and he bolted in the manner alleged in the petition above referred to, one fails to understand how the enquiring Magistrate could observe in his enquiry report that two witnesses including Mukhlal Singh were examined and that their statements went to support the case of the complainant. The enquiring Magistrate forwarded to the Court certain statements recorded by him. It may be mentioned that no statement of any of the eye witnesses is to be found with the record. The learned Second Officer, who held the enquiry in this case, has referred to an incident which he calls "a little episode." The incident is this: During the enquiry some witnesses including two Mukhtars, who had worked for the complainant in the case in which the complainant was an accused, came forward to say that a certain sum of money was deposited with one of the Mukhtars by a man called Bhajan Singh of village Harpur, P. S. Majorganj. It was made to appear that the money was deposited on the understanding that the complainant would withdraw his case. Who this Bhajan Singh is, one does not know. The enquiring Magistrate used the statements alleged to have been made by this man, but he did not think it necessary to examine him. Upon a perusal of the statements recorded by the enquiring Magistrate one finds that while according to one set of witnesses a sum of Rs. 400 was deposited with the Mukhtar, according to another set of witnesses the amount deposited was Rs. 357. There can be no doubt that the mind of the enquiring Magistrate was considerably influenced by what he calls a "a little episode." The whole thing, for all one knows, might have been a got-up affair only to create prejudice against the petitioner and to lend indirect support to the complainant's case which was apparently weak in view of the fact out of four witnesses mentioned in the petition of complaint two were not willing to come forward to support his case. The enquiring Magistrate examined the complainant on solemn affirmation, and, in his statement, the complainant offered an explanation as to why the compromise fell through. According to him a sum of Rs. 400 was deposited, but he demanded Rs. 192 more for costs and for the fines paid by him and six others who were accused with him and who were also convicted. This explanation entirely runs counter to the statement contained in paragraph 8 of the petition of complaint. In paragraph 8 of the complaint petition

it is said that the complainant approached the petitioner and wanted a refund of the amount of bribe taken by him. This will mean nothing more than a sum of Rs. 400. If exactly this amount was deposited by Bhajan Singh on behalf of the petitioner, it is difficult to understand why the complainant should have demanded Rs. 192 more.

[14] From the above discussion, though short, it will be seen that the case of the complainant was never consistent. This is what one expects if false allegations are made and a complainant acts as a mere tool in the hands of designing persons. It is true, this Court rarely goes into facts in criminal revisions, but regard being had to the circumstances of the case, I am clearly of the opinion that it is a fit case in which the Court should consider the facts as well. The petitioner is apparently a man of social position and respectability. It is true, the law is no respecter of persons, but before a criminal prosecution is launched against a person who, apart from his respectability, was also an Honarary Magistrate at the time of the alleged occurrence, the allegations should be subjected to careful scrutiny. I have examined the relevant materials on the record and from what I have stated above, it will be seen that upon a consideration of the facts and circumstances of the case one is left with the impression that the case is in all probability false. There can, therefore, be no justification for a trial in this case.

[15] The application in revision, thus, succeeds. The rule is made absolute and the proceedings against the petitioner are quashed.

**Sinha J.**—I agree to the order proposed.

S.C. *Application allowed.*

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**A. I. R. (35) 1948 Patna 414** *[C. N. 145.]*

MEREDITH J.

*Jagarnath Singh and others—Petitioners* v. *Francis Kharia and others — Opposite Party.*

Criminal Revn. Nos. 82 and 85 of 1948, Decided on 6-4-1948, against order of Magistrate, 1st Class, Simdega, D/-5-6-1947.

**Criminal P. C. (1898), S. 145—Proceedings are of summary nature—Judgment six months after conclusion of hearing—Judgment by successor Magistrate on arguments heard by predecessor and not himself—Order set aside—Criminal P. C. (1898), S. 350.**

Proceedings under S. 145 are intended to be summary to preserve the peace. The hearing was concluded on 13-12-1946, and an adjournment for argument was granted. The matter was then postponed for one reason or another and the judgment was not finally delivered until June 1947—nearly six months after the conclusion of the hearing. The judgment was written by the successor Magistrate who had not heard the arguments:

*Held*, that though the Magiatrate in suitable cases acts on evidence recorded by his predecessor, he cannot act upon the arguments made before his predecessor which he has never heard and the order could not therefore be upheld. [Para 3]

Annotation:—('46-Com) Criminal P. C., S. 145, N. 3 Pt. 5; S. 350 N. 5.

*Sarjoo Prasad and Ray Paras Nath*—for Petitioners.

*L. K. Choudhury*—for Opposite Party.

**Order.**—These applications are by the second party in two proceedings under S. 145, Criminal P. C., relating to two different villages, but which were disposed of by the same judgment.

[2] The proceedings started in May 1946, and on 27th November 1946, they were converted from S. 144 to S. 145. Thereafter the learned Subdivisional Magistrate, Simdega, heard evidence on 11th, 12th and 13th of December 1946. The matter was then adjourned for argument, and arguments were not heard until 4th January 1947. After that judgment was reserved without fixing any date directly against the directions several times issued by this Court. On 26th February, the Magistrate further adjourned the matter to 21st April. Thereafter he was transferred. On 21st April, these cases came before his successor who recorded "No time. Put up on 3rd May." On 3rd May he noted that judgment was not ready. "Put up on 5th of June," and finally on 5th June orders were passed without hearing any fresh arguments.

[3] It is difficult to speak with moderation of the course which these proceedings took. Here we have proceedings which are intended to be summary to preserve the peace. The hearing was concluded on 13th December, and an adjournment of nearly three weeks for argument was granted. The matter is then postponed for one reason or another, and the judgment is not finally delivered until June—nearly six months after the conclusion of the hearing—and finally the judgment is written by a Magistrate who has heard no arguments in the case. A Magistrate may no doubt act in suitable cases on evidence recorded by his predecessor, but I fail to understand how he can act upon arguments made before his predecessor which he has never heard. I am certainly not prepared to uphold orders passed in such circumstances, and I must express my strong disapprobation of the conduct of both these Magistrates. Nor am I prepared to allow the matter to be disposed of now merely after hearing fresh arguments because the cases have become so stale that the whole situation may have changed.

[4] In the circumstances the order in these two cases will be set aside, and, should the Magistrate find that there is now any danger of

a breach of the peace, proceedings should be initiated *de novo*. The rule is accordingly made absolute.

R.G.D. *Rule made absolute.*

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**A. I. R. (35) 1948 Patna 415** *[C. N. 146.]*

AGARWALA C. J. AND MEREDITH J.

*Nathu Mander and others* — *Appellants* v. *Suraj Narain Jha*—*Respondent.*

Letters Patent Appeal No. 7 of 1947, Decided on 15-1-1948, from judgment of Ray J., D/- 23-1-1947.

**Civil P. C. (1908), O. 32, R. 3— Minor effectively represented in execution — Defect in appointment of guardian — No prejudice to minor — Sale is valid.**

Provided the interest of the minors was effectively represented in the execution proceedings, a mere defect in the appointment of the guardian does not suffice to invalidate the sale in the absence of proof that the minors were prejudiced : *Case law relied on.* [Para 5]

Annotation:— ('44-Com.) C. P. C., O. 32, R. 3, N. 5, 7.

*Cases referred:*—

1. Appeal No. 473 of 1943, D/- 7-11-1946 (Pat.), Shiva Sahai Ram v. Sundar Mandal.
2. ('44) 23 Pat. 640 : 32 A. I. R. 1945 Pat. 133 : 220 I. C. 31, Madhusudan v. Jogendra.
3. ('23) 2 Pat. 335 : 10 A. I. R. 1923 Pat. 242: 71 I.C. 705, Satdeo Narain v. Ramayan Tewari.
4. ('03) 30 I. A. 182 : 30 Cal. 1021 : 8 Sar. 512 (P.C.), Walian v. Banke Behari Persbad Singh.
5. ('42) 29 A.I.R. 1942 Pat. 372 : 199 I. C. 144, Param Munda v. Santosh Mahto.
6. ('42) 29 A.I.R. 1942 Pat. 264 : 198 I. C. 821, Badri Mahto v. Lochan Sah.

*Mahabir Prasad and P. Jha*—for Appellants.

*P. R. Das, S. N. Bose and P. K. Bose*—for Respondent.

**Agarwala C. J.** — This is a Letters Patent Appeal by the plaintiffs against a decision of Ray J., and arises out of a suit for recovery of part of a holding.

[2] Khosali Mandal and others were the recorded tenants of a holding of 23.4 acres. In 1906, the plaintiffs purchased 10 acres of this holding from Khosali, and later sold a part of it to Bhusi Mandal and another part to Gokul Ram Marwari, retaining the balance for themselves. The plaintiffs' purchase was not recognised by the landlords, but their possession was noted in the remarks column of the record of rights.

[3] In 1933, the landlords instituted a suit for rent against the recorded tenants, and, in execution of the decree which they obtained in that suit, the entire holding was put up for sale and sold. At this sale the landlords were the purchasers. In the suit Khosali's nephews, who were minors and were co-tenants with him in the holding, were represented by a guardian ad litem appointed by the Court. Notices of the execution proceedings, however, were not served on this guardian. The minors were represented by their uncle Khosali. The sale was held on 10-8-1934, and confirmed on 10-9-1934. On 2-8-1935, Khosali, on his own behalf and on behalf of his minor nephews, made an application under O. 21, R. 90 to have the sale set aside. This was dismissed. The landlords, who had purchased the holding in execution of the rent-decree, obtained delivery of possession on 24-1-1935, and settled it with the defendants on 8-7-1935. The plaintiffs alleged that they were dispossessed by the defendants in 1942.

[4] The first Court dismissed the suit, but this decision was reversed in appeal. Thereupon, defendants preferred an appeal to this Court, with the result that the decision of the first Court was restored. It was contended in the second appeal, as it had been in the lower appellate Court, that the executing Court had no jurisdiction to sell the holding because notice under O. 21, R. 22 was not served on the guardian ad litem, who had been appointed to represent the minors in the suit. This contention was overruled by Ray J. who, on a review of the conflicting decisions, on the subject, held that the minors had been effectively represented in the execution proceedings by their natural guardian Khosali and that they had not been prejudiced. The question whether the minors were properly represented in the execution proceedings was not raised in the pleadings, or in the issues that were framed at the trial. The appellants, however, rely on a statement in the judgment of the lower appellate Court that it was the admitted case of both parties that no order was obtained from the Court for the removal of the guardian ad litem who had been appointed to represent the minors in the suit and for the appointment of their uncle Khosali to represent them as their guardian in the execution proceedings, and reliance was placed on the unreported decision of a Division Bench of this Court in Second Appeal No. 473 of 1943.[1] The facts of that case were very similar to those of the present, and it was held that the sale was void so far as it related to the shares of the minors. There was, however, one important difference between the facts of that case and the facts of the present case, and that is that the natural guardian of the minors who represented them in the execution proceedings allowed an application under O. 21, R. 90 to set aside the sale to be dismissed for default. In that case it was the minors who were challenging the sale, so that the dismissal of their application under O. 21, R. 90 for default of appearance of their guardian must be regarded as prejudicial to their interests. In the present case it is not the minors who are challenging the sale, and it is clear that their uncle who represented them in

the execution proceedings was not negligent of their interest, for he took such steps as were available to him to challenge the sale by an application under O. 21, R. 90 which was pressed to a decision on the merits. The use of the word "void" in reference to the sale in the unreported case, to which reference has been made, was not intended, I apprehend, to indicate that, in the view of the learned Judges who decided that case, the sale was a complete nullity, for that would have been contrary to the view which has prevailed in this Court and to a decision to which Fazl Ali C. J. himself was a party, 23 Pat. 640,[2] which is not referred to in the judgment of the unreported case. In 2 Pat. 335[3] this Court, following the decision of the Privy Council in 30 I. A. 182,[4] held that where a minor is properly a party to a suit, that is to say, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the case as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. This decision was followed in 23 Pat. 640[2] where, however, it was pointed out that the position would be different where the minor has been prejudiced, and that, in such a case, a decree obtained against him may be set aside. That an irregularity with regard to the appointment of a guardian of a minor is a matter of prejudice and not of jurisdiction was also held in A.I.R. 1942 Pat. 372[5] which was decided by myself. The same result follows from the decision of the Division Bench in A. I. R. 1942 Pat. 264,[6] where the final decree prepared in a mortgage suit showed the minor judgment-debtor as being represented by his mother as his natural guardian, whereas in the preliminary decree he was shown to be represented by a guardian ad litem appointed by the Court. It was contended in that case that as there was nothing to show that the guardian ad litem appointed by the Court had been discharged, the minor's mother had no right to represent him as guardian, and that, consequently, he was not properly represented when the final decree was passed. It was held that it was for the minor to show that he had not been properly represented and not for the decree-holder to show that the guardian ad litem appointed by the Court had been discharged and his natural guardian was appointed to represent him, and that, in view of the rule *omnia præsumuntur rite acta*, it should be presumed that at the time the final decree was passed the minor was properly represented.

[5] With regard to the admission referred to in the judgment of the lower appellate Court on which the plaintiffs rely, this must be construed strictly and not extended by speculation. All that the admission states is that the parties were agreed that no order was obtained from the Court for the removal of the guardian ad litem appointed to represent the minors at the trial and for the appointment of Khosali Mandal to represent them in the execution proceedings. So far as the first part of this admission is concerned, it does not preclude the possibility that the guardian ad litem was not alive at the time of the execution proceedings, and as the question was not raised at the trial, the materials are not available on the record for the determination of the matter. So far as the second part of the admission is concerned, namely, that there was no formal order for the appointment of Khosali Mandal to represent the minors in the execution proceedings, the decisions to which I have referred are clear that, provided the interest of the minors was effectively represented in the execution proceedings, a mere defect in the appointment of the guardian does not suffice to invalidate the sale in the absence of proof that the minors were prejudiced. In the present case, the execution sale is not challenged by the minors, and there is no reason to apprehend that their interests were prejudiced. The appeal must, therefore, be dismissed with costs.

**Meredith J.**—I agree.

S.C. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 416 *[C. N. 147.]*

AGARWALA C. J. AND NARAYAN J.

*Ramanand Pathak and others*—*Appellants* v. *Bindhachal Tewari and others* — *Respondents.*

A. F. A. D. No. 1751 of 1946, Decided on 17-2-1948, from decision of Sub-Judge, Chapra, D/- 31-5-1946.

**Civil P. C. (1908), O. 21, R. 95 — Effect of symbolical possession on limitation — Symbolical possession is to be deemed equivalent to actual possession as against judgment-debtor.**

Where in execution of a decree, symbolical possession is delivered of immovable property to the person entitled to possession thereof, and such a person brings a suit for recovery of actual possession, the symbolical possession is to be deemed equivalent to actual possession as against the judgment-debtor or his representatives and the suit will be deemed to have been brought in time if it has been brought within twelve years from the date of the symbolical possession. The delivery of symbolical possession is the line of demarcation between possession precedent and possession subsequent: *Case law discussed.* [Para 11]

**Annotation : ('44-Com.) Civil P. C., O. 21, R. 35, N. 4.**

*Cases referred* :—

1. ('80) 5 Cal. 584, Juggobhundhu Mukherji v. Ramchunder Baisak.
2. ('21) 43 All. 520 : 8 A. I. R. 1921 All. 9 : 63 I. C. 212 (F. B.), Jang Bahadur v. Hanumant.
3. ('12) 36 Bom. 373 : 14 I. C. 447 (F. B.), Mahadev Sakharam v. Janu Namji.

4. ('18) 27 C. L. J. 191 : 4 A. I. R. 1917 P. C. 197: 43 I. C. 268, Radhakrishna Chanderji v. Ram Bahadur.
5. ('23) 27 C. W. N. 259 : 9 A. I. R. 1922 Cal. 176: 70 I. C. 602, Jankinath Saha v. Baikuntha Nath.
6. ('28) 50 All. 813 : 15 A. I. R. 1928 All. 412 : 115 I. C. 791, Sitaram v. Ram Sundar.
7. ('22) 20 A. L. J. 641 : 9 A. I. R. 1922 All. 463 : 73 I. C. 920, Ramlakhan Singh v. Haraknarain Ram.
8. ('27) 53 M. L. J. 339 : 14 A. I. R. 1927 Mad. 849 : 105 I. C. 243, Kanayya v. Mahalakshmi.
9. ('28) 3 Luck. 506 : 15 A. I. R. 1928 Oudh 251 : 110 I. C. 70 (F. B.), Gulab Khan v. Ataulla.
10. ('32) 11 Pat. 165 : 19 A. I. R. 1932 Pat. 145 : 142 I. C. 246, Ram Prasad Ojha v. Bindeshwari Prasad.

*K. C. Sanyal and A. N. Chatterji*—for Appellants.
*Harnarayan Prasad and L. S. Singh*
— for Respondents.

**Narayan J.**—This is a second appeal by the defendants and it arises out of a suit for partition in which there was also an alternative prayer for recovery of possession in case the plaintiff was found to be out of possession. The plaintiff's case was that he had purchased three-fourth share in 4 bighas 15 kathas and 15 dhurs of kaimi kast land in execution of a decree and that joint possession had been delivered to him on 23-8-1931. The whole of the remaining one-fourth share in the land was held by one Mt. Baborna Kuer, a lady of the defendants' family who is now dead leaving these defendants as her heirs.

[2] There were two sets of defendants in the suit, the first set being the heirs and descendants of Geyan Pathak against whom the plaintiff had obtained his decree, and the second set being the zarpeshgidars of a portion of the land sold. The claim was resisted by some of the defendants first party and they pleaded that the plaintiff had acquired no valid title by virtue of his alleged auction-purchase as the entire proceeding from the commencement of the suit up to the auction sale was fraudulent. They also contended that the plaintiff had never obtained joint possession and that his claim was barred by limitation.

[3] Both the Courts concurrently found that the plaintiff had acquired valid title to three-fourth share in the property by virtue of the purchase at the auction sale and that the proceedings were not vitiated by fraud. They overruled the plea of limitation and passed a decree for recovery of possession and partition.

[4] The defendants have preferred this second appeal, and the only point urged in his appeal is that the Courts below should have held that the suit was barred by limitation.

[5] The suit as originally instituted was a simple suit for partition, but when the hearing of the suit was about to commence, the plaintiff filed a petition for the amendment to the plaint. The amendment was allowed, and the alternative prayer for recovery of possession was added. This amendment was sought and allowed more than twelve years after the date of delivery of possession, and it is contended that if in the circumstances of this case it was necessary for the plaintiff to seek such an amendment, then no decree for recovery of possession could be granted to the plaintiff as the claim for recovery of possession had not been made within twelve years from the date of delivery of possession. The date of the plaintiff's purchase is 17-3-1930 and the date of delivery of possession is 23-8-1930. The present suit was instituted on 11-8-1942. The Courts below have held that the plaintiff had never got actual possession, but they were of the opinion that as the period of limitation would be reckoned from the date of delivery of possession, the present suit will be deemed to be within time. We are bound by the findings of the Court below that the plaintiff had never got actual possession, and taking this finding to be correct, we have to decide whether the plaintiff's claim for recovery of possession and partition can be deemed to be in time. The delivery of possession which is said to have been effected on 23 8-1930 must be taken to be a mere symbolical delivery of possession, and the question, therefore, arises whether, where the judgment-debtor is in actual possession of the property and only symbolical possession is delivered to the execution purchaser, such delivery of possession would be available to the execution purchaser for saving the period of limitation.

[6] There was once a conflict of opinion on this point and while the Full Bench of the Calcutta High Court in 5 Cal. 584[1] held that symbolical possession as against the defendant to the suit or the judgment-debtor would be deemed equivalent to actual possession, the Full Bench of the Allahabad High Court in 43 ALL. 520[2] and the Full Bench of the Bombay High Court in 36 Bom. 373[3] held that the mere delivery of formal or symbolical possession of immovable property to a decree-holder in execution of a decree cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupation of a tenant or other person entitled to occupy the same. But, in my opinion, after the decision of the Judicial Committee of the Privy Council in 27 C. L. J. 191[4] there is no room for divergence of views on this point. The Calcutta case and the Privy Council case may be cases where the only delivery to which the decree-holders were entitled was symbolical, but their Lordships of the Judicial Committee laid down a rule of general application to the effect that "symbolical possession availed to dispossess the defendants sufficiently because they were parties to the proceedings in which it was ordered and given" and they ex-

pressed their agreement with the view that had been taken in the Calcutta case. Their Lordships expressly dissented from the view taken by the Bombay and the Allahabad High Courts that where the judgment-debtor is in actual possession, limitation cannot run anew unless actual possession is delivered to the execution purchaser or the decree-holder as provided for by O. 21, R. 35 or O. 21, R. 95, Civil P. C.

[7] In another Calcutta case, 27 C. W. N. 259,[5] it was held that where in a mortgage suit immovable property was sold in execution of the decree and the auction-purchaser was given not actual but symbolical possession and his suit for recovery of possession was brought within twelve years from the date on which he had obtained symbolical possession, his suit would be deemed to be within time. It seems that even the Allahabad High Court does not now adhere to the view which was put forward in the Full Bench case referred to above. The Allahabad case in 50 ALL. 813[6] is a case in which the auction-purchaser of an undivided share in a joint property had obtained symbolical possession. Their Lordships held that if the judgment-debtor had continued in possession along with the other co-owners, limitation in respect of a suit to obtain actual possession by means of physical partition of the share purchased would run against the purchaser from the date of the delivery of formal possession. In another case of the same Court, 20 A. L. J. 641,[7] it was held that the delivery of formal possession to the predecessor-in-title of the plaintiffs gave them a fresh starting point of limitation.

[8] The Madras High Court took the same view in 53 M. L. J. 339.[8]

[9] The Full Bench of the Lucknow Chief Court in 3 Luck. 506[9] held that in a case where the auction-purchaser has purchased a share in a property sold and has thereby became a cosharer with others, the only way of his getting a valid and effective delivery of possession is by getting delivery under O. 21, R. 95, Civil P. C., and that such a delivery of possession to the decree-holder amounts to a dispossession of the judgment-debtor, and that if the auction-purchaser sues for recovery of actual possession, the date from which the time would begin to run would be the date on which he obtained delivery of possession under O. 21, R. 95, Civil P. C.

[10] This Court in 11 Pat. 165[10] had to deal with a case where the plaintiffs had brought a suit to recover possession of immovable property basing their title on an auction purchase in execution of a mortgage decree and it had been alleged that they had failed to get possession from the defendants. The view taken was that Art. 144, Limitation Act, was applicable and that the possession of the defendants became adverse to the plaintiffs not from the date of the sale but from the date of the delivery of possession.

[11] The true rule, therefore, deducible from the authorities is that where in execution of a decree, symbolical possession is delivered of immovable property to the person entitled to possession thereof, and such a person brings a suit for recovery of actual possession, the symbolical possession were to be deemed equivalent to actual possession as against the judgment-debtor or his representatives and the suit will be deemed to have been brought in time if it has been brought within twelve years from the date of the symbolical possession. In other words, it is now well established that the delivery of symbolical possession is the line of demarcation between possession precedent and possession subsequent.

This appeal is, therefore, without any merit and is dismissed with costs.

[13] **Agarwala C. J.** — I agree.

V.B.B. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 418** *[C. N. 148.]*

AGARWALA C. J.

*Erfan Ali Choudhary — Petitioner* v. *The King.*

Criminal Revn. Petn. No. 72 of 1948, Decided on 6-4-1948, from order of Sessions Judge, Dumka, D/- 7-1-1948.

**Criminal P. C. (1898), S. 205 — Dispensation of personal attendance — Offence punishable with fine only — Accused's property within jurisdiction available for realization of fine if imposed — Accused lying ill — Appearance through pleader should be permitted.**

**Where the petitioner who was lying ill was accused of an offence punishable only with a fine and the petitioner had property within the jurisdiction of the Magistrate which could be available for the realization of the fine in the event of a conviction, the petitioner should be permitted to appear through a pleader. [As the Magistrate refused to excuse the personal attendance of the accused, the High Court interfered in revision and permitted him to appear through pleader.]**

**[Para 1]**

**Annotation:— ('46-Com) Criminal P. C. S. 205 N. 4, 10.**

*S. N. Sahay and R. S. Sinha* — for Petitioner.

**Order.**— The petitioner has been summoned to take his trial for an offence under S. 6, Cinematograph Act, 1918, in the Court of the Subdivisional Magistrate of Rajmahal. A petition was filed before the Subdivisional Magistrate, alleging that the petitioner was lying ill at Dacca, supported by a medical certificate. The petitioner prayed that he be allowed to appear through a pleader. This application has been rejected. Although this Court is reluctant to interfere with the discretion of the Subordinate Courts, the

learned Magistrate in this case does not appear to have appreciated the fact that the offence with which the petitioner is accused is punishable only with a fine, and that the petitioner has property within the jurisdiction of the Magistrate which will be available for realisation of the fine in the event of a conviction. The petitioner is permitted to appear through a pleader, provided a pleader is present to represent him on the next and every subsequent occasion on which the case is taken up.

V.B.B. *Petition allowed.*

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**A. I. R. (35) 1948 Patna 419** *[C. N. 149.]*

SINHA AND MAHABIRPRASAD JJ.

*Sm. Sulochana Debi — Appellant* v. *Mt. Puranjaya — Respondent.*

A. F. O. D. No. 291 of 1945, Decided on 12-4-1948, from decision of Addl. Dist. Judge, Bhagalpur, D/- 6-12-1945.

**Succession Act (1925), Ss. 232, 233—Representative of universal legatee is not entitled to letters of administration with will annexed.**

None of the provisions of the Succession Act provide for the representative of a universal legatee being admitted to prove the will and apply for the grant of letters of administration with the will annexed.

*Held*, on the construction of the will that the applicant was not the representative of the residuary legatee but at best was the representative of a universal legatee. [Para 5]

*R. K. Chaudhury and B. N. Jha* — for Appellant.
*L. K. Jha and A. B. Jha* — for Respondent.

**Judgment.**—This is an appeal from the decision of the Additional District Judge of Bhagalpur granting letters of administration with the will annexed to one Mt. Puranjaya, widow of Ram Krishna Jha, by his judgment dated 6-12-1945.

[2] The appeal is by one Mt. Sulochana who happens to be the daughter's daughter of the deceased testator, Churaman Jha. The facts that need be stated in order to bring out the point which we propose to decide are these. The testator, Churaman Jha, had three daughters, namely, Mt. Jagdamba, Mt. Bindbashni and Mt. Nandrani. Jagdamba had a son, Ram Krishna, whose widow, Mt. Puranjaya, is the applicant for the grant of the letters of administration. Churaman Jha is alleged to have executed the will in question on 9-2-1907, and to have died after the execution of the will the same year. Bindbashni, the second daughter of Churaman Jha, died in the year 1918 without leaving any issue. Jagdamba, as already said, had a son, Ram Krishna, who died in the year 1920. It appears that on 12-1-1926, Jagdamba executed a deed of gift in favour of Puranjaya, her widowed daughter-in-law, in respect of her own share in the properties inherited by her as also in respect of half the share of Bindbashni which, on the death of Bindbashni, were taken in equal shares by the two surviving daughters, Jagdamba and Nandrani. In the year 1930 or 1932, Nandrani died leaving behind her a daughter named Sulochana, who is the objector to this grant of the letters of administration. On 13-6-1944, the present application for grant of the letters of administration with the will annexed was made before the District Judge of Bhagalpur. Mt. Sulochana appeared and objected to the grant of the letters of administration on various grounds. One of the grounds taken by her was that Mt. Puranjaya had no *locus standi* to apply for the grant of the letters of administration of the will in question, apart from objecting on the ground that the will in question was not the last will and testament of the deceased, Churaman Jha, and denying that it was executed by him. Her case was that her mother; Mt. Nandrani, inherited the sixteen annas estate of Churaman Jha, which, on her mother's death, passed on to herself, and that Mt. Puranjaya, the applicant, had no interest in the properties, and had no *locus standi* to make this application.

[3] The learned Additional District Judge raised two questions for decision : first, whether Churaman Jha duly executed the will in question, and whether it was his last writing and testament; and secondly, whether the applicant was entitled to letters of administration with the copy of the will annexed. He held in favour of the applicant on both the questions, and granted the letters of administration with the will annexed, as applied for. Hence this appeal by Mt. Sulochana, the objector.

[4] Mr. Rati Kant Chaudhury, appearing for the appellant, has, at the outset, contended that the applicant, under the law, had no right to make this application, and that the Court below was in error in granting the letters of administration with the will annexed to the applicant, in the circumstances of the present case. His argument is that the right to apply for grant of probate and letters of administration is governed by the Succession Act, and referred to Ss. 231, 232, 233, 234 and 235 as dealing with this question. Under S. 231, it is only when the executor renounces, or fails to accept an executorship within the time limited for the acceptance or refusal thereof, that the will will be proved, and letters of administration granted to one who would be entitled to administration in case of intestacy. So long as there is an executor to apply for and receive a grant of letters of administration with the will annexed, no one has a right to make such an application. In case of there being no executor, or the executor failing to apply for grant of letters of administration, a universal or a residuary legatee is entitled under S. 232 to

prove the will, and the letters of administration with the will annexed will be granted to him of the whole estate or of so much thereof as may be unadministered. If the residuary legatee is dead, or is not available to apply for the grant of letters of administration, S. 233 of the Act provides for his representative making an application in that behalf. In case where there is no executor and no residuary legatee or representative of the residuary legatee, or he declines or is incapable to act or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, becomes entitled under S. 234 of the Act to be admitted to prove the will, and letters of administration may be granted to him or them accordingly. The question now, therefore, is as to whether Mt. Puranjaya comes in the category of any of the persons so named in the various sections of the Succession Act as being entitled to make an application for the grant of letters of administration.

[5] It was contended by Mr. Jha, appearing for the respondent, that Mt. Jagdamba, one of the daughters of Churaman Jha and one of the legatees under the will, was a residuary legatee, and she, having, by a deed of gift, transferred her interest to the present applicant, Mt. Puranjaya, the latter was representative of a residuary legatee, and as such was entitled to make this application. Mr. Rati Kant Chaudhury, appearing for the appellant, has drawn our attention to Ss. 102 and 103 of the Act, and has contended that none of the daughters, in whose favour the legacies were made under the will, would come under the term "residuary legatee" within the meaning of those sections. As laid down in S. 102 of the Act, a residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property. Section 103 of the Act lays down that, under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect. We have examined the terms of the will, and we are satisfied, that none of the daughters, in whose favour the legacies were made under the will, can be called residuary legatees: they are at best universal legatees. None of the provisions of the Succession Act provide for the representative of a universal legatee being admitted to prove the will, and apply for the grant of letters of administration with the will annexed. It is, therefore, plain that the present applicant, Mt. Puranjaya, not being a representative of a residuary legatee, as contended for by Mr. Jha, had no right to make the application, and the Court below was not entitled to grant the letters of administration with the will annexed at her instance.

[6] In that view of the matter, it seems unnecessary to deal with the other point in the case, namely, as to whether the will in question is the last writing and testament of Churaman Jha, and whether it was duly executed as a will by him.

[7] In the result, the appeal is allowed, and the order of the learned Additional District Judge is set aside; but, in the circumstances of the case, there will be no order as to costs.

R.G.D. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 420** *[C. N. 150.]*

MANOHAR LALL AND MUKHARJI JJ.

*Pushkar Prasad — Defendant—Appellant* v. *Suraj Prasad Mahajan and others, Plaintiffs and others, Defendants — Respondents.*

A. F. A. D. No. 295 of 1946, Decided on 5-12-1947, from decision of Addl. Dist. Judge, Gaya, D/- 3-10-1945.

**Limitation Act (1908), Art. 132 — Mortgage suit — Due date means date fixed for repayment of mortgage money — It has no reference to subsequent transfer by mortgagor.**

**Due date which is mentioned in Col. 3 of Art. 132, as starting point of limitation can only mean the date fixed in the mortgage bond as the date by which the mortgage amount should be re-paid and it cannot have any reference to the transfer by the mortgagor which brings into existence a transferee who was not in existence on the due date or on the date of the mortgage transaction: 23 A. I. R. 1936 Mad. 70; 20 A. I. R. 1933 Cal. 912 and 14 A. I. R. 1927 Pat. 411, *Disting.*; 19 A. I. R. 1932 P. C. 165; 22 A. I. R. 1935 P. C. 85 and 22 A. I. R. 1935 Mad. 680, *Ref.* [Para 6]**

**Hence, where in a mortgage suit the mortgagee impleads a person who claims to be a purchaser of the mortgaged property in execution of rent decree, after more than 12 years of the date when the mortgage money became due, the suit is barred against such person even if the mortgagee had no knowledge of such transfer within 12 years: 35 Cal. 519 (F. B.), *Rel. on.* [Paras 3 & 11]**

*Cases referred:*—

1. ('33) 60 Cal. 1 : 19 A. I. R. 1932 P. C. 165 : 59 I. A. 283 : 137 I. C. 529 (P. C.), Nagendra Nath De v. Sureshchandra De.
2. ('35) 57 All. 242 : 22 A. I. R. 1935 P. C. 85 : 62 I. A. 80 : 155 I. C. 205 (P. C.), Maqbul Ahmad v. Onkar Pratap Narain Singh.
3. ('36) 59 Mad. 312 : 23 A. I. R. 1936 Mad. 70 : 170 I. C. 856, Sambasiva Ayyar v. Subramania Pillai.
4. ('33) 60 Cal. 1193 : 20 A. I. R. 1933 Cal. 912 : 147 I. C. 808, Sumendra Lal Kundu v. Ahmmad Ali.
5. ('27) 8 P. L. T. 229: 14 A. I. R. 1927 Pat. 411, Mt. Nand Kuer v. Kunj Behari Lal.
6. ('43) 22 Pat. 761 : 31 A. I. R. 1944 Pat. 119 : 216 I. C. 328, Ganga Prasad Singh v. Mt. Ganeshi Kuer.
7. ('35) 157 I. C. 1050 : 22 A. I. R. 1935 Mad. 680, Gopalan Nair v. Moideen Madar Rowther.
8. ('07) 11 C. W. N. 350 : 35 Cal. 519 (F. B.), Ram Kinkar Biswas v. Akhil Chandra.

*Lal Narain Sinha and S. P. Singh* — for Appellant.

*Rai Paras Nath* —for Respondents.

**Manohar Lall J.**— This is an appeal by defendant 1 who is aggrieved by the concurrent decisions of the Courts below by which they have decreed the mortgage suit against him. The question for decision is whether the suit was barred by limitation as against the appellant.

[2] The plaintiff sought to enforce a mortgage bond dated 12-9-1927, of which the due date of re-payment was 29-9-1928. The suit was filed on 30-9-1940, as 29th of September, was a Sunday: The plaintiff impleaded besides the family of the mortgagors also defendant 9 as a subsequent transferee who filed a written statement to the effect that the property which he has purchased was in the possession of the appellant as a result of some execution sale held in realisation of a rent decree. Pushkar Prasad, defendant 10, the appellant before this Court, was accordingly impleaded as a defendant 10 by a petition filed on 8-2-1941. It would be noticed that on that date the mortgage suit against the appellant had become barred by limitation.

[3] Defendant 10, after he was served with summons, filed a written statement in which inter alia he contended that the suit against him was barred by limitation. The Courts below have concurrently overruled this contention upon their view that as the plaintiff had no knowledge of the transfer in favour of the appellant before 18-2-1941, the suit was within time even as against the said defendant-appellant. Hence the second appeal to this Court.

[4] In my opinion, the Courts below have taken an erroneous view of the law and the learned Additional District Judge, who has otherwise written a careful judgment, was wrong in refusing to follow the decisions which he has noticed in his judgment but sought to distinguish erroneously.

[5] To begin with, it is appropriate to recall attention to the weighty words of their Lordships of the Judicial Committee in the Privy Council case in 60 Cal. 1[1] where they observed that:

"The fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship."

and that

"in construing such provisions, equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide."

Again, in 57 ALL. 242[2] their Lordships overruled the argument that there was some sort of judicial discretion which would enable the Court to relieve the party from the operation of the Limitation Act in a case of hardship, in these words:

"It is enough to say that there is no authority to support the proposition contended for. In their Lordships' opinion it is impossible to hold that, in a matter which is governed by the Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that section 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings."

[6] Such then, being the position in law, how could the period of limitation to enforce a mortgage security which is fixed by Art. 132, Limitation Act, be extended? Learned advocate for the respondents suggested that the due date, which is the starting point of the limitation as mentioned in column 3 of Art. 132, should be construed to mean the date when defendant 10 having been made a party was apprised of his rights to redeem and pay up the mortgage debt. I am unable to accept this argument as sound. The due date can only mean the date fixed in the mortgage bond as the date by which the mortgage amount should be re-paid and it cannot have any reference to the transfer by the mortgagor which brings into existence a transferee like the present appellant before this Court who was not in existence on the due date or on the date of the mortgage transaction.

[7] The learned Additional District Judge sought to support his conclusion by relying upon 59 Mad. 312,[3] 60 Cal. 1193[4] and 8 P. L. T. 229,[5] but in all those cases it will be observed that the cause of action arose to the plaintiff in his capacity not as a mortgagee but as an auction-purchaser who had become the owner of the property and was resisted in taking delivery of possession from the transferee of the equity of redemption, whom he had not joined in the mortgage suit. Several of these cases were reviewed by me in 22 Pat. 761,[6] but the position in those cases does not exist in the present case.

[8] In 157 I. C. 1050,[7] Madhavan Nair, J. took a similar view as reported in the head-note that:

"The purchaser of the equity of redemption in a suit by the first mortgagee to which the second mortgagee whose existence was not known had not been impleaded, gets a fresh cause of action to enforce the mortgage against the second mortgagee from the date of the purchase in execution and consequently a suit to enforce the first mortgage against the second mortgagee which is instituted within 12 years of the date of purchase would not be time barred even though it is instituted after the expiry of more than 12 years from the date of the mortgage."

[9] It is not necessary in this case to decide what the equities would be if and when the plaintiff becomes an auction-purchaser in execution of the mortgage decree which he has obtained in the Courts below and is resisted by defendant 10.

[10] On the other hand, the present case falls expressly within the Full Bench case in 11 C. W. N. 350[8] where it has been clearly laid down that even where a subsequent transferee is made a party at the instance of the Court after the expiry of the period of limitation, the mortgage suit must be dismissed as against him on the ground of limitation. There the learned Chief Justice in the course of the argument put this question to the advocate for the plaintiff "How is your security affected?" and the answer was given:

"It is not affected in any way as the plaintiff would have no grievance if he gets a decree for sale of the entire mortgage security."

[11] On the above grounds, therefore, I am satisfied that the Courts below are wrong in holding that the suit of the plaintiff was not barred by limitation on the date when the appellant was made a party.

[12] The result is that the appeal is allowed, the decisions of the Courts below are set aside and the suit is dismissed against the appellant. As the appellant put forward the defence that the mortgage bond in suit was a farzi transaction and no consideration actually passed thereunder and that the property which he had purchased at the auction-sale does not form part of the mortgage security, I would direct that as between him and the plaintiff-respondents each party will bear his own cost in this litigation in this Court and in the Court below.

**Mukharji J.**—I agree.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 422** *[C. N. 151.]*

MANOHAR LALL AND RAMASWAMI JJ.

*Shaikh Ulfat Hussain and another*—*Appellants* v. *Kali Ram Dokania and others* — *Respondents.*

A. F. O. D. No. 17 of 1943, Decided on 16-1-1948, from decision of Sub-Judge, Bhagalpur, D/- 7-10-1942.

(a) Bengal Estates Partition Act (5 [V] of 1897), S. 94 — Collector can change original kistbandi dates.

Under S. 94 the Collector is empowered to change the original kistbandi dates fixed for the payment of the land revenue at the time of the Permanent Settlement. [Para 8]

(b) Bengal Land-Revenue Sales Act (11 [XI] of 1859), S. 33—Sale of estate not in arrears is without jurisdiction — Civil suit to set aside such sale is not excluded under S. 33.

The Collector has no jurisdiction to sell any estate under the Act if there are no arrears in fact. A suit to set aside such a sale held without jurisdiction is not excluded from the cognizance of the civil Court under S. 33 by reason that the point that there were no arrears was not raised in an appeal before the Commissioner. [Paras 12, 13]

*Case referred* :—

1. ('98) 25 I. A. 151 : 25 Cal. 833 : 7 Sar. 363 (P. C.), Bal Kishen Das v. Simpson.

*S. C. Mazumdar, M. Rahman and Ramanugraha Prasad* — for Appellants.

*L. K. Jha, S. N. Bose, Gopal Prasad, U. N. Sinha and S. S. Asghar Hussain* — for Respondents.

**Manohar Lall J.** — In this appeal by the plaintiffs the question for decision is whether the learned Subordinate Judge was right in refusing to set aside the revenue sale upon the allegation that the sale was without jurisdiction as there was no arrear in fact for which the sale was held.

[2] The material facts are not in dispute. Mahal Matha Dih bore Tauzi No. 3411 on the tauzi ledger at a revenue of Rs. 132-5-0. On 18th June 1867 there was a collectorate partition of the mahal as the result of which nine annas and six pies of the parent estate was carved into village Narayanpur bearing Tauzi No. 4038 at a revenue of Rs. 16-6-0 which was made payable in two instalments, Rs. 8 in April and Rs. 8-6-0 in December (see Ex. 3). The remaining portion of the mahal was converted into Tauzi No. 4039 representing three annas of the mahal and Tauzi No. 4040 representing the remaining three annas and six pies of the mahal. We are not concerned in this case with the last two tauzis.

[3] In 1920-21 as the result of an application by a cosharer of three annas four gandas and one cowrie of Narayanpore, Tauzi No. 4038, a separate account for Tauzi No. 4038/1 was opened and the revenue fixed was Rs. 2-2-0 payable in April and Rs. 2-6-0 in December. The residuary share or the ijmali share of 12 annas 15 gandas and 3 cowries retained Tauzi No. 4038 at a revenue of Rs. 11-14-0 which was payable in two instalments i. e. Rs. 5-14-0 in April and in December Rs. 6. On 9th May 1939 the Collector issued a notification under S. 7 of Act 11 [XI] of 1859 (the Revenue Sale Law)—hereinafter to be called the Act — forbidding the raiyats to pay rent, and in that notification it was stated that Rs. 2-8-6 on account of arrears of land revenue in respect of Tauzi No. 4038/ijmali having a sadar jama of Rs. 16-6 0 was found due under S. 2 of the Act and 28th March 1939 was fixed under S. 3 of the Act for payment of the same and whereas this was not paid by 28th March 1939, the ijmali share would be sold by public auction on 5th June 1939. In accordance with this notification, the sale was held on 5th June 1939 and purchased by the defendant for Rs. 630. Ulfat Hussain, plaintiff 1, alleges that he purchased various shares in this tauzi by several transactions of the years 1930, 1931, 1932 and 1933 for a sum of Rs. 12,000. The remaining share in the tauzi is alleged to have belonged to the pro forma defendants. Plaintiffs 1 and 2 filed

separate appeals on 2nd August 1939, before the Commissioner of Bhagalpur to have the sale set aside, but the appeals were rejected. They also failed to get any relief from the Board of Revenue. Accordingly the present suit was instituted on 4th June 1940, by plaintiffs 1 and 2, in which they joined the pro forma defendants as defendants second party, upon the allegation that the sale held on 5th June 1939 was without jurisdiction as the tauzi was not in arrears in fact on the date of the sale, and in any case even if there was any arrear, the sale could not have been held on that date before the expiry of the period of grace in January 1940. It was also alleged that notices required by Ss. 6 and 7 of the Act had not been served in the manner required by law with the result that a property worth about Rs. 14,000 has been sold for a grossly inadequate sum of Rs. 630. It was also alleged that defendant 2 was the real purchaser who purchased the property benami in the name of his creature, defendant 1.

[4] Kali Ram, defendant 1, alone contested the suit, and he urged that he was the real purchaser that the suit of the plaintiffs was barred by limitation by S. 33 of the Act as they did not urge the principal ground of attack to the sale in the appeal before the Commissioner. It was pleaded that the kist bandi for the tauzi in suit was not payable in April and December from the time of the Permanent Settlement and even if it is proved that the kists were so fixed in April and December by subsequent kabuliyats, this was wholy unauthorised and not binding upon the Collector. On the question of fact it was pleaded that the arrear for which the sale took place was actually due in March 1939. It was denied that there was any defect in the notices under Ss. 6 and 7 of the Act or there was any illegality or fraud in publishing or conducting the sale. It was denied that the plaintiffs have suffered any loss on account of any inadequacy in the price fetched.

[5] The learned Subordinate Judge has come to these conclusions :

(1) There is serious doubt if the Batwara officer was under the law empowered to change the original kistbandi dates for payments of land revenue fixed with the proprietors of the mahal at the time of permanent settlement and fix new kistbandi dates for the separated tauzi (tauzi No. 4038) of the mahal.

(2) Even if it be supposed that April and December as mentioned in the agreement, Ex. 3, were the kistbandi dates within the meaning of S. 2, Revenue Sale Law for payment of land revenue, he is satisfied on the evidence that the tauzi was in arrear to the extent of Rs. 2-6-0 on 28th March 1939 which was the latest day for payment of the same fixed by the Board of Revenue under S. 3 of the Act.

(3) There is no inaccuracy of share of the estate in the notices issued by the Collector under Ss. 6 and 7 of the Act and these notices were duly served in accordance with law.

(4) In view of S. 33 of the Act the plaintiffs are not entitled to take any ground for setting aside the sale which was not taken by them before the Commisioner.

(5) The plaintiffs are precluded from impeaching the title of the auction-purchasers by reason of any omission, informality or irregularity as regards serving or posting of the various notices required by the Act."

Accordingly he dismissed the suit. Hence the appeal to this Court.

[6] The substantial point argued by Mr. S. C. Mazumdar is that the learned Subordinate Judge is in error in giving the first two findings quoted above.

[7] Exhibit 3 is the kistbandi dated 8-1-1868, for payment of Government revenue in respect of 9 annas and 6 pies share in Narayanpur, taluqa Mahta dih. It states:

"The partition of the said mahal was confirmed by the Revenue Commissioner (in order) No. 42, dated 18-6-1867. We do therefore execute this kistbandi and declare that we shall pay the Government revenue as per instalments given below.

| Rs. | a. | p. | |
|---|---|---|---|
| 16- | 5- | 6¾ | |
| 0- | 0- | 5¼ | Increase |
| 16- | 6- | 0 | |

April Rs. 8/- December Rs. 8/6/.

Dated 8-1-1868."

[8] This document is found attached to the batwara nathi and is executed by Ahmad Ali Mandar and others by the pen of Jhumak Lal Mokhtarkar—these persons were the then proprietors of the separated tauzi 4038. This kistbandi was executed in accordance with S. 94, Estates Partition Act, which provides that when the partition is confirmed and the Collector gives possession to the proprietors of the separated estate, he must call upon the proprietors to enter into a separate engagement for the payment of such land revenue. Mr. Jha contended that the Collector had no jurisdiction to fix dates for payment of the revenue other than those fixed at the time of the Permanent Settlement. But I am unable to agree with this contention in view of the clear provisions of S. 94. I do not understand how the learned Subordinate Judge felt any doubt as to whether the Batwara Officer was empowered under the law to change the original kistbandi dates fixed for the payment of the land revenue at the time of the Permanent Settlement. His attention does not appear to have been drawn to the clear provisions of S. 94. Accordingly, I do not agree with the first finding of the Subordinate Judge and would hold that the instalment fixed for the payment of the land revenue for the residuary share in question was validly fixed and which was in April and December each year.

[9] The next question is: when did the estate fall into arrears in 1938 or in 1939. It is impor-

tant to draw a distinction between S. 2 and S. 3 of the Act. Section 2 provides that if the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. I have already found that the instalments of the revenue for the tauzi in suit were payable in April and in December. Therefore, by the application of S. 2 the revenue which is not paid in April in each year would be considered an arrear of revenue on the 1st of May following. Similarly, the instalment which was payable in December each year would, if unpaid, be considered an arrear of revenue on 1st January following. Section 3 then provides that the Board of Revenue shall determine upon what dates all arrears of revenue shall be paid up in each district, in default of which payment the estates in arrear in those districts shall be sold at public auction. For the district within which the estate in suit is situated the Board of Revenue have fixed 12th January and 28th March as the latest dates fixed for the payment of arrears of revenue—see column 3 p. 144 of the Board's Tauzi Manual, 1924 edition—the estate pays an annual revenue exceeding Rs. 10 but not exceeding Rs. 50.

[10] This being the position, the problem to be solved is whether the estate in suit was in arrear and on what date. The extracts from the tauzi ledger for 1936-37, 1937-38, 1938-39 are on the record and explain the position clearly.

[11] (After examining the entries in the tauzi ledger his Lordship proceeded thus:) I, therefore, fail to understand how from the books of the Collector it can be even suggested that there was an arrear at the end of December 1938. The Collector is bound by these books of account which show that in January 1939, there was an advance payment. Mr. Jha faintly suggested that the books of the Collector are wrong and that he being an independent purchaser is not bound by any mistake in the calculation in the books of the Collector. In my opinion, it is unnecessary to consider this argument because I find that the books of the Collector are not wrong in fact. These books had never been altered and no suggestion had been made to any of the witnesses of the Collector or anyone else that these figures in the books of the Collector are wrong.

[12] For these reasons, I am of opinion that the learned Subordinate Judge should have held that this estate was not in arrears in December 1938 and, therefore, was not in arrear on 1-1-1939. This estate on the other hand was in excess on 31-1-1939. The instalments payable for the revenue in 1939 were April and December according to the kistbandi, but according to the date fixed by the Board of Revenue it is the non-payment of the arrear of these two instalments which would have rendered the estate liable. As a result of non-payment of April 1939 instalment in full the estate would be deemed to be in arrear on 1-5-1939. The latest date for the payment of this arrear could not be earlier than January 1940. The sale of the estate, therefore, on 5-6-1939, was wholly without jurisdiction. It is now well settled that the Collector has no jurisdiction to sell any estate if there are no arrears in fact.

[13] Mr. Jha contended that this particular point was not taken under S. 33 of the Act in the appeal before the Commissioner. The answer to this contention is to be found in the well-known case of the Privy Council 25 I. A. 151.[1] The head-note states:

"Act XI of 1859 does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue."

And it was held that the Collector had no jurisdiction to sell and that the suit was not excluded from the cognizance of the civil Court under S. 33 by reason of the Commissioner not having adjudicated on the objections to the sale. Lord Watson in delivering the judgment of the Board observed at p. 158:

"The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid. But the chief and substantial objection upon which the appellants' plaint is based is that, at the time when their 5 annas share of the village Shahazadpore Anderkilla was sold, there were no arrears of revenue due by them in respect of it. It does not appear to their Lordships to admit of dispute that the objection is founded in fact. In their opinion a stupid blunder made by the Collector or his staff in his own books cannot deprive the appellants of their right to claim, and have effect given to, the permanent abatement which was allowed by the Board of Revenue in March 1884. The result is that the whole proceedings of the Collector, with a view to the sale of the 5 annas share, were beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorised. Although it may be attended with some irregularity or illegality. Their Lordships are accordingly of opinion that it was rightly held by the Subordinate Judge that he had jurisdiction to entertain the objection to the sale to which he gave effect, although the point had not been considered and disposed of by the Commissioner."

[14] Mr. Mazumdar argued that the learned Subordinate Judge was wrong in holding that notices under Ss. 6 and 7 of the Act were valid and in accordance with law or were served in accordance with law. Having perused the evidence and seeing the notices we are satisfied that the findings of the learned Subordinate Judge on these two questions are well founded and must be affirmed. Mr. Mazumdar, however, is entitled to relief upon my finding that there was no arrear in fact on the date of the sale.

[15] The result is that the appeal is allowed, the decision of the learned Subordinate Judge is set aside, and the suit of the plaintiffs is dismissed, but in the circumstances each party will bear his own costs in this Court and in the Court below.

**Ramaswami J.**—I agree.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 425** *[C. N. 152.]*

AGARWALA AG. C. J. AND RAMASWAMI J.

*Baldeo Bind and others — Appellants* v. *Sk. Abdul Aziz and others — Respondents.*

A. F. A. D. No. 2382 of 1946, Decided on 20-11-1947, from decision of Sub-Judge, Arrah, D/- 19-9-1947.

**(a) Civil P. C. (1908), O. 7, R. 7 — Relief on ground different from one stated in plaint — Suit for declaration of right to take out processions by route traversing another man's agricultural land — Claim based on easement — Relief on ground of customary right cannot be granted.**

In a suit by certain Muhammadans in their individual capacity, the principal relief claimed in the plaint was for a declaration that the plaintiffs had a right of easement during certain Muhammadan festivals to take out tazias and processions by certain route, part of which traversed the agricultural land of the defendants. The averments in the plaint were in general for the purpose of showing the right to the easement which the plaintiffs claimed :

*Held* that the plaintiffs could not be permitted to succeed on the ground of customary right. [Para 2]

Annotation : ('44-Com.) Civil P. C., O. 7, R. 7, N. 1, Pt. 7.

**(b) Custom (General) — Customary rights — Right to go in procession by certain route—Route traversing agricultural land bearing valuable crops — Claim to customary right held must fail on ground of want of reasonableness — Mere fact that processions were allowed to go over land when it was lying fallow, held insufficient to establish customary right.**

The Muhammadan inhabitants of certain villages sued for a declaration of the right of their community to go in procession, during certain Muhammadan festivals, by a certain route. Part of this route traversed the agricultural land of the Hindu tenants, bearing valuable crops. Before the land was cultivated by its existing tenants, it was *parti* land. It was established as a fact that the Muhammadan processions were carried over this land at a time when it was in the occupation of Muhammadans and was lying fallow :

*Held* that any claim that the plaintiffs had by custom established a right to go in procession through land bearing valuable crops must fail on the ground of want of reasonableness. [Paras 2, 3]

*Held also* that the mere fact that the people were allowed to go in procession over it was insufficient to establish a customary right to do so. It merely indicated that the processions were carried over the land with the permission of the occupants and not as of right. [Para 3]

*A. B. N. Sinha* — for Appellants.

*B. C. De and Nizamuddin* — for Respondents.

**Agarwala Ag. C. J.** — This appeal is by the defendants against concurrent decisions of the Courts below and has been referred to a Division Bench by Sinha J. before whom it first came sitting singly. The plaintiffs sued for a declaration that the Muhammadan community in five villages had the right, during certain Muhammadan festivals including the Muharram, to go in procession by a certain route and to carry tazias by that route from one place to another. Part of the route traverses the agricultural land of the appellants, defendants 1 to 3, who denied the existence of the right claimed by the plaintiffs. The plaintiffs were six in number, and they purported to institute the suit as representatives of the Muhammadan community of the locality. They failed, however, to comply with the requirements of O. 1, R. 8, Civil P. C., with the result that the litigation has been treated as a suit by the plaintiffs in their individual capacity and not as representatives of their co-religionists. The principal relief claimed in the plaint was for a declaration that the plaintiffs have a right of easement to take out tazias and processions by the route shown in the sketch map attached to the plaint, and the averments in the plaint were, in general, for the purpose of shewing the right of the plaintiffs to the relief which they sought, that is to say, the right to the easement which they claimed. The first Court held that the plaintiffs had established by prescription the right which they claimed, that is to say, the finding of the first Court is the existence of the prescriptive easement. On appeal by the defendants, however, the learned Subordinate Judge rightly held that the plaintiffs had failed to establish any easement, there being no allegation or proof of any dominant for whose benefit the alleged easement could exist. The Subordinate Judge has, however, held that the plaintiffs have established a customary right to pass over the land of the defendants for the purposes alleged in the plaint and has come to a finding that the plaintiff have for 40 years or so, followed the route indicated in the map attached to the plaint.

[2] The decision of the Courts below has been challenged on various grounds; but I propose to deal with only two of them, namely, whether on the plaintiffs' pleadings it was open to the Court below to give the plaintiffs the declaration which has been given and, secondly, whether, on the findings of the Court below, a valid custom for the plaintiffs to pass over the defendants' land had been established. With regard to the first of these points, it is a well established principle of pleading that the plaintiffs cannot be permitted to succeed on facts which they have not both alleged and proved and that they are not entitled to give evidence that is not in consonance with the pleadings. On the other hand, it is also well established that in India, where pleadings

are not usually drawn up with that particularity which is characteristic of the pleadings of some other countries, they have to be more liberally construed than would otherwise be the case. But, in the present instance, it appears to me to be quite obvious why the plaintiffs did not in their plaint make out a case of the existence of a customary right and preferred to rely on the allegation that what they claimed was an easement. Had they averred the existence of a customary right, the reasonableness of the right would have been a matter in issue, and they would have had to shew, in spite of all indications of commonsense to the contrary, that it is reasonable for a large body of men to pass through agricultural land belonging to another, in which that latter has, at the cost of considerable energy and expense, raised valuable crops. It is admitted by one of the plaintiffs himself. who was examined as witness 5, that this land has been under the cultivating possession of the defendants for forty years, during twenty-five of which Indian corn or makai was grown on it, and that for the last five years or so tobacco has been grown on it. Any claim that the plaintiffs have by custom established a right to carry tazias and go in procession through land bearing either of these crops must, in my view, fail on the ground of want of reasonableness, and that, in my opinion, is why the plaintiffs chose to frame their suit as a suit for declaration of a right of easement, and they should not have been permitted by the Court below to succeed on a ground which they had avoided pleading in the first instance.

[3] With regard to the reasonableness of the right pleaded, I have already indicated my view, and it is not necessary to reiterate it. But it has been contended that before this land came into the possession of the defendants it was in the possession of Muhammadan inhabitants of the locality and that the right of that community to use this land as part of the route for carrying their tazias during their festivals was established before the present Hindu occupants of the land became tenants of it. There is no finding to that effect. What does appear is that before this land was cultivated by its present Hindu tenants it was parti land. With regard to such land, the mere fact that people are allowed to go in procession over it, or to carry tazias, is insufficient to establish a customary right to do so, for, in this country, generally speaking when land is lying fallow, the owner of it does not object to it being used as a passage. It is only when the land is actually under cultivation that objection arises. If, therefore, it had been established as a fact that the Muhammadan processions and tazias were carried over this land at a time when it was in the occupation of Muhammadans and was lying fallow, that would merely indicate that it was carried with their permission and not as of right. In my view, therefore, the plaintiffs are not only not entitled to succeed on the ground on which they have succeeded in the Court below, but on the findings, they have not established the right which they claim. I would, therefore, set aside the decisions of the Courts below and dismiss the plaintiffs' suit with costs in all Courts.

**Ramaswami J.** — I agree.

V.B.B. *Appeal dismissed.*

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## A. I. R. (35) 1948 Patna 426 *[C. N. 153.]*

RAY J.

*Khudiram Ojha—Appellant* v. *Sm. Amodebala Debi and others—Respondents.*

A. F. A. D. No. 967 of 1946, Decided on 2-1-1948, from decision of Addl. Sub-Judge, Purulia, D/- 25-2-1946.

**Evidence Act (1872), S. 32(7)—Object and scope—On death of widow *S*, *M* taking possession of her property—Admission by *M* about *S's* death in mortgage deed—Certificate sale of property—Purchase by *M's* daughter *A*—Suit by reversioners of husband of *S* to recover property—Time of *S's* death in question—Mortgage deed held admissible for that purpose—*A* held not successor-in-interest or legal representative of *M* for purpose of admissibility of document—Evidence Act (1872), S. 21.**

The object of cl. (7) of S. 32 is that the statement must have been made in relation to a transaction where it was necessary to make the statement. Section 32 aims at keeping out gratuitous statements which were either not necessary to be made at the time and on the occasion when they were made or which it was not the duty of the party who made them to make. [Para 3]

One *S*, the widow of *B*, died leaving some land which was taken possession of by *M*. After *M* remained in possession for more than 12 years, the property was sold in execution of a certificate decree against *M* and was purchased by *A* the daughter of *M*. The reversioners of *B* brought a suit for declaration and possession of the property against *A*. The defence was that *M* had, before the sale, acquired title by adverse possession. As to the proof of the time of death of *S*, a document evidencing a transaction by which *M* extended the terms of a usufructuary mortgage on receiving some more money from the mortgagee in possession for the purpose of defraying the expenses of *S's* shradh, was put in evidence:

*Held* that the statement contained in the document was admissible in evidence under S. 32 (7) to prove that *S* was dead by the time that document was executed. [Para 5]

*Held* further, that although *A* was the daughter of *M*, since she had purchased the property at a court sale, she could not for all purposes be considered to be a successor-in-interest or a legal representative of *M* for the purpose of admissibility of the document. [Para 3]

Annotation.—('46-Man), Evi. Act, S. 32, N. 31; S. 21, N. 3.

*Cases referred*:—

1. ('22) 9 A. I. R. 1922 P. C. 102 : 100 I. C. 835 (P.C.), Pattabhiram Rao v. Narayana Moorthy.

2. ('25) 29 C. W. N. 469 : 12 A. I. R. 1925 Cal. 684 : 86 I. C. 674, Radhakrishna v. Sarbeswar Nag.
3. ('36) 17 P. L. T. 507 : 23 A. I. R. 1936 Pat. 543 : 15 Pat. 260 : 165 I. C. 589, Jyoti Prasad Singh Deo v. Bharat Sah.
4. ('35) 14 Pat. 461 : 22 A. I. R. 1935 Pat. 167 : 155 I. C. 470 (F. B.), Soney Lal Jha v. Darabdeo Narain Singh.

*R. S. Chatterjee*—for Appellant.
*S. K. Mazumdar*—for Respondents.

**Judgment**—This appeal has been preferred by the plaintiff who brought the suit for a declaration of title and recovery of possession in respect of certain lands appertaining to khewat No. 47 and khewat No. 46. Of the two khewat lands, No. 46 was exclusively the property of late Sadhu Debya, the widow of Ashirbad Missir, the last male holder. Khewat No. 47 is the shamilat between khewat 46 and khewat 3. Khewat 3 was the property of Biraja and was recorded in her name in the latest record of rights. In this case, two names occur very frequently namely that of Mohini and Biraja. It should be remembered that they are related as mother-in-law and daughter-in-law. Khewat No. 3 belonged to Biraja who inherited it from her husband who was son of Mohini and her husband Lallu Missir. The plaintiffs claimed these properties in suit as reversioners of Ashirbad on the death of Sadhu Debya about the time of whose death there is some controversy which will be dealt with presently. The plaintiffs' case is that on the death of Sadhu Debya, they related as they were to Mohini, entrusted her with its management. In their ignorance, the property was sold in execution of a certificate decree obtained against Mohini and purchased by defendant 1 who is Mohini's daughter. An allegation of collusion between Mohini and defendant 1 had also been made by the plaintiffs, but has not been believed by the Courts below. The point has not been re-agitated in this Court, it being a question of fact. The defendant repels the plaintiffs' claim on two grounds, namely, that they have not been in possession of the properties within 12 years of the suit, and secondly that Mohini by her adverse possession since after Sadhu Debya's death had acquired a title to the disputed lands by the time they were sold in certificate proceedings and in those circumstances defendant 1 acquired a good title to the properties in suit. Lastly it was contended that in any view defendant 1 was entitled to tack her possession with that of Mohini and defeat the plaintiffs' claim as barred by limitation. The Courts below have come to the finding that Sadhu Debya died in the year 1328 which is equivalent to 1921-22 if not earlier. They have also found that since then Mohini Debya was openly and continuously in adverse possession of the properties till the time of the certificate sale which took place on 6th August 1934. As I have already stated, it is at that sale that defendant 1 had purchased. The Courts below have, therefore, held that defendant 1 acquired a good title to the disputed properties. It is undisputed that defendant 1 has been in possession since delivery of possession through Court which took place in 1934.

[2] The plaintiffs in second appeal contend that the finding as to the time of Sadhu's death based as it is on an inadmissible document, namely, Ex. D, is vitiated and that this document being ruled out, there were no materials before the Courts below to base a finding on, that Mohini had acquired title by adverse possession by the date of the certificate sale. It is further contended that possession of Mohini and of defendant 1 cannot be tacked as they are independent trespassers. Lastly, it is contended that as the properties appertaining to khewat No. 47 were held in co-tenancy between Mohini and Sadhu Debya, the defendant in order to succeed should have established ouster which she has not been able to do. The later contentions are on the basis that it is Art. 144 that governs this case and not Art. 142, Limitation Act. The contention of ouster can at once be ruled out on the ground that khewat No. 3 with which khewat No. 47 is held in common tenancy, was the property of Biraja who inherited it from her husband, and Biraja's ownership was exclusive of that of Mohini. Mohini's possession of Sadhu Debya's properties, therefore, cannot be said to be the possession of a co-tenant. It could be so said with some amount of force with regard to possession by Biraja. This contention is based probably on the misconception of fact that Mohini and Biraja are for the purposes of possession identical persons. In fact they are not so. Not only are they two different natural persons but also their rights and liabilities with regard to the properties of the holder are independent of each other.

[3] A very forceful argument has been advanced with regard to the inadmissibility of Ex. D. This document evidences a transaction by which Mohini Debya extended the terms of a usufructuary mortgage on receiving some more money from the usufructuary mortgagee already in possession as such for the purpose of defraying the expenses of Sadhu Debya's sradh. The learned lower appellate Court relied upon the statement made in the document by Mohini to the effect that the money was required for the purpose of Sadhu Debya's sradh and concluded therefrom that Sadhu Debya must have died by that date. It is contended by Mr. R. S. Chatterji that as a statement it is not admissible in favour of defendant 1 who is no other than Mohini's daughter. It has to be remembered in

assessing the value of this argument that she is not claiming the property as an heir of her mother. She is an auction purchaser at a certificate sale held against Mohini, the certificate debtor. The natural relationship, therefore, between defendant 1 and Mohini is quite irrelevant for the purpose of establishing that defendant 1 derives her interest from Mohini. That a statement made by a person cannot be used by him as evidence in his favour nor by his successors-in-interest or legal representatives is well known and is an undisputed proposition. But I do not consider that it applies in the present case. Had defendant 1 purchased the property from Mohini by a private sale, she could be such a person as is contemplated in the rule above cited. She is an auction-purchaser at a court sale. She, therefore, cannot for all purposes be considered to be a successor-in-interest or a legal representative of Mohini for the purpose of admissibility of the document, EX. D. I should, however, not rest my decision upon this opinion but would assume that if EX. D was a mere statement of Mohini by way of an admission it would be irrelevant as a piece of evidence in favour of defendant 1. But it has to be examined whether it is admissible under any provisions of law contained in the Evidence Act. The provision that strikes me in support of its admissibility is that contained in S. 32, cl. (7) which reads:

"Statements written or verbal of relevant facts made by a person who is dead when the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in S. 13, cl. (a)."

The statement that the loan was required for performing Sadhu Debya's sradh after her death is contained in a deed or a document. The question arises whether the document relates to any such transaction as is mentioned in S. 13, cl. (a). Section 13, cl. (a) reads:

"Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence."

It has been strenuously contended that EX. D does not relate to a transaction within the meaning of S. 13 (a) as the plaintiffs against whom it is sought to be used as evidence were not parties to the transaction. I experienced some difficulty in accepting this argument. Section 13 (a) standing by itself refers to a transaction as between parties in relation to any right or custom as to the existence of which the question for consideration has arisen, but so far as cl. (7) of S. 32 is concerned it only takes the help of S. 13 (a) in order to indicate the nature of the transaction to which the document containing the statement relates. Not that it will necessarily be in relation to what can be called to be a transaction as between parties for the purpose of its admissibility without the help of S. 32. If a question had arisen between Mohini and Paran Ghunya EX. D would certainly relate to what can be called a transaction within the meaning of S. 13 either cl. (a) or cl. (b). Therefore even though that very question is not in issue in this case as between the parties, the document did relate to a transaction as between the parties to it. The object, so far as I have been able to understand, of cl. (7) of S. 32 is that the statement must have been made in relation to a transaction where it was necessary to make the statement. Section 32 aims at keeping out gratuitous statements which were either not necessary to be made at the time and on the occasion when they were made or which it was not the duty of the party who made them to make. Understood in that background, it appears to me to be a document within the meaning of cl. (7) of S. 32. The statement in EX. D, therefore, fulfils the conditions necessary for its admissibility under S. 32 (7), namely, (1) that the statement is contained in a document, (2) that it was made by a person who is dead, and (3) that the document related to what can be called a transaction within the meaning of S. 13 (a). For the purpose of this clause, cl. (a) of S. 13 has to be read independently of the other portions of S. 13. The whole of S. 13 is never intended to be read for the purpose of interpretation of this clause. Had that been so, then the Legislature would have simply stated S. 13 which would have necessarily included S. 13 (b) as well. There is certainly a point in referring to cl. (a) but not to (b).

[4] I shall now address myself to the decisions cited by Mr. Chatterji in order to see whether they conflict with the view that I have taken. He has first relied upon the Privy Council decision in A.I.R. 1922 P. C. 102[1] at p. 103. This has hardly any application as it simply pronounces that no party or his representative can rely upon an admission of his own, a proposition which is neither denied nor disputed. The next case relied upon is 29 C.W.N. 469.[2] There too the admissibility of a statement in a document under S. 32, cl. (7) did not arise for consideration. The only passage in which S. 32 is mentioned is :

"Under S. 21, Evidence Act, an admission cannot be used as evidence in favour of the person making it or any person claiming under him except under some circumstances, one of which is that it may be so used if it is relevant otherwise than as an admission. It is, therefore, necessary to consider if the statement above referred to is otherwise relevant and as such can be proved on behalf of the person making it. It is not seriously contended that the statement is relevant under S. 11, Evidence Act, as it can hardly be said to be a 'fact' within the meaning of that section, nor is it maintained that it is admissible under any of the clauses of S. 32, though it appears that Makhan Ray is

now dead. But it is attempted to make it evidence under S. 13, Evidence Act."

[5] This makes it clear that the point was neither argued nor came up for decision in this case. Reliance is next placed upon the case in 17 P. L. T. 507.[3] The question that arose for consideration in this case was whether a statement made by a vendor as to the nature of his right in the land sought to be vended is admissible as proving a claim within the meaning of S. 13 (b), Evidence Act. It was held that the word "claim" in S. 13 (b), Evidence Act indicates that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim. This also is of no help in this case because, as I have already shown, S. 13 (b), Evidence Act, does not come into picture in considering the admissibility of a statement under the provisions of sub-s. (7) of S. 32, Evidence Act. The last case relied upon in which S. 32 has been taken into consideration, though not sub-s. (7), is that in 14 Pat. 461.[4] There the statement was a recital in a deed of instrument by a person who was dead at the time. Those statements were sought to be proved as admissible under S. 32 (2) and (3) and it was found that the statement did not fulfil the condition of either sub-s. (2) or sub-s. (3) of the section. It did not fulfil the condition of sub-s. (2) because it was a statement which it was not the duty of a person, namely, the vendor to make, the statement being with regard to the boundaries of the lands sold. Secondly, the statement of the boundaries did not fulfil the condition of sub-s. (3) as it was not against the pecuniary or proprietary interest of the person making it. Whether the statement was admissible as one contained in a document which related to a transaction within the meaning of S. 13 (a) was never raised before their Lordships. Mr. Chatterji very seriously contends that any document or statement which is not admissible under some provision of the Evidence Act cannot be admissible under other provisions. The answer to this contention is contained in the passage which I have already quoted from the case reported in 29 C. W. N. 469.[2] In my view, therefore, the statement contained in Ex. D is admissible in evidence under S. 32 (7), Evidence Act, to prove that Sadhu Debya was dead by the time that document was executed. That being so, her possession must be continuously for 12 years by the time the certificate sale took place.

[6] There is another aspect from which the admissibility of Ex. D can be approached. As submitted by Mr. Mazumdar, quite apart from the statements contained in the document, it is a proof of Mohini's possession. The fact of Mohini's possession is not only a fact in issue but also is a fact inconsistent with the other fact in issue, namely, the time of Sadhu Debya's death. Exhibit D proves Mohini's possession in the year 1921-22. This fact would be inconsistent with Sadhu Debya being alive at that time. Therefore, in considering the question when Sadhu Debya died Ex. D becomes a relevant piece of evidence proving the fact of Mohini's possession. It is contended that Ex. D suffers from the same defect as proof of Mohini's possession as it does as proof of the statement contained in it as to Sadhu Debya's death. I fail to understand this contention. Possession is evidenced by acts of the parties in possession and those acts are evidenced by contemporary documents prepared by them in the ordinary course of business. I do not see any reason why Ex. D will not be considered as proof of Mohini's possession at the time when the document came into existence. Proved for this purpose it lends support to the inference drawn by the Court below. Besides, on the point of Sadhu's death the learned lower appellate Court has relied upon oral evidence of D. Ws. 1 and 2 of whom he accepts that D. W. 2 is quite disinterested.

[7] Next it is contended that it has not been proved that Mohini was all along in possession since Sadhu's death. This contention is based on the circumstances that the documents relied upon mainly relate to periods within 12 years except Ex. D which is beyond 12 years. This argument also cannot be given effect to particularly in view of the defence case. The defendants say that on Sadhu Debya's death they entrusted the management of the disputed property to Mohini who continued to remain in possession on their behalf. In this view the actual physical possession by Mohini is not denied, rather admitted. The Courts below have disbelieved the story of entrustment on a very cogent ground, namely, that Mohini and the plaintiffs were on terms of litigation even before the final publication of the record of rights. I am, therefore, of opinion that the Courts below have rightly held that Mohini had acquired a right by adverse possession by the time the certificate sale took place.

[8] The next contention that has been advanced is that the possession of defendant 1 cannot be tacked with that of Mohini as they are independent trespassers. This argument no doubt smacks of inconsistency in the learned counsel's view. As I have already shown, he has been arguing with great amount of force that defendant 1 derives her interest from Mohini and, therefore, Mohini's statements cannot be used on her behalf as they are Mohini's admissions and as defendant 1 derives her interest from Mohini. It is somewhat unusual to contend

in the course of the same plea and in relation to the same subject-matter that for certain other purposes they are independent, that is to say, not one deriving interest from the other. At any rate, however, I may disfavour this argument. I will not proceed to consider it because it does not arise for consideration in consideration of the view that I have already taken with regard to the findings arrived at by the Courts below.

[9] The last argument of ouster has already been dealt with. In the result I find no merit in this appeal which is, therefore, dismissed with costs.

S.C. *Appeal dismissed.*

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**A.I.R. (35) 1948 Patna 430** *[C. N. 154.]*

AGARWALA C. J. AND MEREDITH J.

*Gauri Singh — Petitioner* v. *Ramlochan Singh and others — Opposite Party.*

Civil Revn. No. 42 of 1947, Decided on 28-1-1948, from order of Sub-Judge, Arrah, D/-7-5-1945.

(a) Arbitration Act (1940), Ss. 14 (2), 17 and 39 (1) (vi) — Oral submission to arbitration — Suit for filing award — Written statement challenging existence or validity of arbitration agreement — Suit decreed — Written application treated as application under S. 33 — Order refusing it held appealable under S. 39 (1) (vi)—Suit outside Act for filing award under oral submission to arbitration held not maintainable.

Under an oral submission to arbitration the arbitrators made an award and a suit was brought to file the award. In this suit the written statement challenged the existence and validity of the arbitration agreement. The Court decreed the suit in terms of the award. The defendant appealed. It was contended that no appeal lay:

*Held* that the defendant's written statement could be treated as an application under S. 33 and the order of the Court amounted to a refusal of that application and hence an appeal lay under S. 39 (1) (vi). [Para 17]

*Held further* that S. 14 (2) can only be read as referring to awards based on written arbitration agreements. As in this case there was oral submission to arbitration an application under S. 14 (2) was not maintainable. The Act is exhaustive and as it contains no provisions for the enforcement of an award based upon an oral submission, a suit outside the Act for filing such an award is not maintainable. [Para 33]

(b) Arbitration Act (1940), S. 33 — Scope — Application to set aside award can be made under S. 33. [Para 17]

(c) Arbitration (1940), S. 20 — S. 20 has nothing to do with application to file award obtained without intervention of Court.

Section 20 relates to a stage prior to the award and an application to file in Court the arbitration agreement, and proceed to arbitration with the intervention of the Court. It has nothing to do with an application to file award obtained without intervention of Court. [Para 13]

*Cases referred:*—

1. ('09) 33 Bom. 69 : 1 I. C. 622, Rukhanbai v. Adamji.
2. ('34) 58 Bom. 369 : 21 A. I. R. 1934 Bom. 79 : 150 I. C. 478, Mathuradas v. Manganlal Parbhudas.
3. ('33) 56 Mad. 85 : 19 A. I. R. 1932 Mad. 745 : 139 I. C. 355, Ponnamma v. Kotamma.
4. ('31) 18 A. I. R. 1931 Pat. 92 : 130 I. C. 810, Ramautar Sah v. Sangat Singh.

*L. K. Jha and T. Nath* — for Petitioner.

*G.P. Das and Harians Kumar*—for Opposite Party.

**Agarwala C. J.** — This is an application in revision by the plaintiff. The facts relating to this application are as follows. The opposite party and their gotias, having obtained a decree against the petitioner, applied for execution. Sometime later the gotias of the opposite party filed two applications stating that the decree had been completely satisfied. The judgment-petitioner also applied for satisfaction of the decree to be certified. The opposite party objected, and the executing Court held that the claim had not been satisfied. Thereupon, on 13.12.1926, 13 bighas of the judgment-debtor's land was put up for sale and sold in execution, the purchasers being the opposite party decree-holder. The judgment-debtor then made an application under O. 21, R. 90, which was dismissed on 14-10-1927. After this the judgment-debtor brought a suit against the opposite party and their gotias, which was dismissed on 10-2-1931. The case of the petitioner is that after this there was an arrangement by which the opposite party agreed to re-convey his lands to him for Rs. 900, of which Rs. 700 was paid and Rs. 200 remained outstanding. There was, however, a dispute between the parties in regard to this matter and this was referred to the arbitration of punches. The punches gave a written award on 18-3-1941. They found that there was an agreement to re-convey the land for Rs. 1000, of which Rs. 625 had been paid and Rs. 375 remained due. The award directed the opposite party to execute a deed of re-conveyance in favour of the petitioner, and the latter to pay the balance due. It was registered on 30-8-1941. The present suit was instituted by the petitioner on 22-11-1941, on a court-fee of Re. 1, the value of the subject-matter for purposes of jurisdiction being stated to be Rs. 3000. In this suit the plaintiff prayed for an order that the award be filed and a decree prepared in accordance with it. The first Court decreed the suit in terms of the award. The defendants appealed. The appellate Court held that the plaintiff had failed to prove that the defendants had agreed to re-convey the property to him, or that there was a dispute between them which had been referred to the punches. The award was held not to be binding on the defendants, and the proceeding to have it filed in Court was held to be barred by limitation. The suit was, therefore, dismissed. It is against this order that the present application has been filed in this Court.

[2] It is contended that the decision of the trial Court was final and that no appeal lay

from that decision. In my opinion, whether the plaintiff is entitled to maintain this application depends on the nature of the proceeding out of which it has arisen. The proceeding was described by the plaintiff himself as a suit, and was initiated by a document which he described as a plaint in which he described himself as the plaintiff. It is drawn up in the form of a plaint and verified by the plaintiff as such. If the proceeding be regarded as a suit the present application must fail because, in that case, the plaintiff had a right to appeal against the decision of the appellate Court, and, therefore, an application to revise that decree does not lie. Even if the application were allowed to be converted into an appeal it would fail on the merits by reason of the finding of the Court of appeal below that there was in fact no reference to the punches.

[3] This application must, in my opinion, also fail if the "plaint" be regarded as an application to file the award. The only procedure prescribed for filing an award is that contained in S. 14 (2), Arbitration Act, 1940. Section 14 occurs in Chap. II of the Act, which includes Ss. 3 to 19 (inclusive) and which governs an arbitration without the intervention of the Court. It also applies to an arbitration with the intervention of the Court, where there is no suit pending, by reason of S. 20 (5), and to an arbitration in a suit by reason of S. 25. The present is an instance of an arbitration without the intervention of the Court, and, therefore, if the Act applies to it at all, it is Chap. II which applies. Section 8 enumerates the circumstances in which an arbitrator or arbitrators may be appointed by the Court. It is not the plaintiff's case that the punches were appointed by the Court. Section 4 applies to a case where the parties to an "arbitration agreement" agree that the arbitrator or arbitrators are to be appointed by a person designated in the agreement. It is not the plaintiff's case that these punches were persons appointed by a person designated by the parties to the alleged agreement to refer the dispute to arbitration. Furthermore, the term "arbitration agreement" has been defined in S. 2 (a) and does not include a parole agreement such as is alleged in the present case. Section 9 refers to an arbitration agreement which provides for a reference to two arbitrators. That also is not the plaintiff's case, for he alleges that the parties agreed to refer the alleged dispute to five punches. Section 10 applies to a case where an arbitration agreement provides for a reference to three arbitrators. There is no provision of the Act which expressly applies to an agreement to refer a dispute to more than three arbitrators. Assuming, however, that such an agreement would be governed by the Act, it is clear that Chap. II of the Act will only apply when the agreement is in writing. In other words, the existence of an "arbitration agreement" i. e. an agreement in writing, is the foundation of the jurisdiction of the Court to direct the arbitrators, under S. 14 (2), to cause the award to be filed in Court.

[4] Reference was made to S. 26 of the Act in support of the contention that the Act applies to a parole agreement to refer a dispute to arbitration. This section provides; "save as otherwise provided in the Act the provisions of this Chapter shall apply to all arbitrations." This section occurs in Chap. V which is headed "General", and, in my opinion, all that S. 26 means is that the provisions of Chap. V shall apply to all arbitrations which are governed by the Act and not that they apply also to arbitrations not governed by the Act.

[5] It follows that the Court of first instance had no jurisdiction to entertain an application to file the award in the present case. In that view of the matter, it is not desirable for this Court to interfere in revision with an order which has relegated the parties to the position they would have been in but for this misconceived proceeding. The result is that the rule must be discharged.

[6] **Meredith J.**—This application raises a number of difficult questions with regard to the interpretation of the Arbitration Act (Act X of 1940). The petition is on behalf of one Gauri Singh. On 22-11-1941, he presented in the Court of the Munsif at Arrah a document headed as a plaint, describing himself as plaintiff, and the opposite party as defendants. In this document he recited that the plaintiff and the defendants are agnates. During the plaintiff's minority the specified property was sold in execution of a decree by the defendants, and there were several subsequent litigations ending in favour of the defendants. When the plaintiff attained the age of discretion, he asked the defendants to return the property on taking its value. The defendants agreed, and the plaintiff deposited Rs. 700, and was to deposit a further Rs. 200, but subsequently differences arose between them, and ultimately the parties appointed certain named persons as arbitrators to decide the disputed points, namely, what amount the plaintiff was to pay, what amount he had already paid, etc.

[7] The arbitrators gave their award on 18-3-1941, for which the plaintiff applied for compulsory registration on 17-7-1941, and the award was registered on the admission of the arbitrators on 30-8-1941. The arbitrators also gave notice to the parties.

[8] When the plaintiff asked the defendants to give effect to the award, they refused to do so. Hence it became necessary for the plaintiff to apply to the Court for filing the award, and getting a decree.

[9] The plaintiff accordingly asked for an order for filing the award and preparing a decree of the Court. A court-fee of Re. 1 only was paid.

[10] The opposite party filed a written statement saying that the plaintiff had no cause of action to institute a suit, and asserting *inter alia* that the plaintiff had never asked them to take money and return the property, nor did the defendants agree to it, nor did the plaintiff deposit any money, nor did the parties appoint arbitrators to settle the points alleged by the plaintiff or for any other purpose. The punches were never appointed, nor was there any arbitration between the parties, nor was any award given. There was no arbitration agreement, nor had any been put forward. The arbitrators were self-styled arbitrators. They got the award registered fraudulently and collusively, and were guilty of misconduct. The defendants accordingly prayed that the plaintiff's suit might be dismissed with costs.

[11] The suit succeeded before the Munsif, who accepted the plaintiff's case and ordered that the suit be decreed in full. The defendants appealed, and the learned Subordinate Judge held that the suit was false, and allowed the appeal, first because there had been no reference to arbitration, and also, because, in his opinion, the suit was barred by limitation.

[12] The point urged by Mr. L. K. Jha for the petitioner is that no appeal lay, and the order of the appellate Court was, therefore, without jurisdiction. He argues that this so-called suit was really an application for filing the award under S. 14 (2), Arbitration Act. The order of the Court was under S. 17, pronouncing judgment according to the award; and S. 17 says that upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award. The appeal which was taken was not upon either of the specified grounds, and, therefore, was incompetent. The case was not one where any appeal lay under S. 39 (1), because the order was not one of any of the six kinds specified in that section.

[13] Mr. G. P. Das for the opposite party contended first that this was an application not under S. 14 of the Act, but under S. 20 of the Act, and an appeal, therefore, lay under S. 39 (1) (iv). This argument need not detain us. Section 20 relates to a stage prior to the award and an application to file in Court the arbitration agreement, and proceed to arbitration with the intervention of the Court. It has nothing to do with a case like the present.

[14] Mr. Das further argues, however, that his clients' written statement amounted, in substance, to an application under S. 33 of the Act challenging the existence or validity of the alleged arbitration agreement and award. The order of the Court amounted to a refusal of this application, and the appeal, therefore, lay under S. 39 (1) (vi), namely, as against an order refusing to set aside an award. The appeal was preferred as a miscellaneous appeal against an order.

[15] Alternatively Mr. Das argues that the Act of 1940 is not exhaustive. It relates only to awards following arbitration agreements within the meaning of the Act. "Arbitration agreement" is defined in S. 2 (a) as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." It was nobody's case that there was any such written agreement. The petitioner's case was that there was an oral reference to arbitration. Such an oral reference is perfectly valid, and so is the award upon it, but it does not come within the scope of the Act. The award can, therefore, be enforced by an ordinary suit under the Civil Procedure Code. Consequently an appeal lay as an appeal from a decree. It was in error described as a miscellaneous appeal, and all that was necessary was that the appellants should pay the necessary court-fee.

[16] The difficulty in dealing with these contentions lies in my opinion, in the fact that the 1940 Act contains examples of bad drafting which it would be hard to beat. Take for example S. 33, which runs :

> "Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court, and the Court shall decide the question on affidavits, etc."

In terms the application is limited to parties to an arbitration agreement or those deriving from them. An arbitration agreement is, therefore, pre-supposed. Yet the Court is to decide upon the existence of such agreement. If the Court decides that there was no such agreement and that there were no parties to any such agreement, upon the terms of the section no application would lie.

[17] Then under S. 30, certain grounds are specified as the sole grounds upon which an award can be set aside, but there is no provision anywhere for an application to set aside an award, unless S. 33 be held to provide for such an application, but S. 33 speaks only of challen-

ging the existence of the validity. However, I am of opinion that an application to set aside an award can be made under S. 33, and I am further of opinion that in any view the written statement in the present case can be considered as an application under S. 33. Upon the view I have expressed, an appeal would lie under S. 39 (1) (vi) against the order of the Court, which amounted to an order refusing to set aside the award.

[18] But then we run up against S. 17. Section 17 runs as follows :

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

It clearly contemplates that the application to set aside the award may be made in the proceedings for filing the award, because, before pronouncing a decree under S. 17, the Court is to wait until the time for making an application to set aside the award has expired, or, if such an application has been made, it is to proceed to the decree after refusing it. Note that as soon as it refuses, a right of appeal arises at once under S. 39 (1) (vi). But the Court is not to await the result of the appeal, if any. So, having refused the application to set aside the award, the Court proceeds to pass a decree filing the award, and then there is no appeal from that decree except upon two limited grounds. What is to happen when, as may well be the case, the appeal against the order refusing to set aside the award is allowed? As to that the Act is silent. But it seems to me to amount to this that either S. 17 takes away with one hand what S. 39 has given with the other or the provision against appeal in S. 17 is ineffective since it is always liable to be frustrated by the appeal under S. 39 (1) (vi). I am myself of opinion that the provisions of S. 17 cannot override the specific provision in S. 39 (1) (vi), and consequently, if the order refusing to set aside the award is subsequently reversed in appeal, it will have the effect of upsetting the judgment and decree under S. 17 as effectively as if an appeal had been allowed against it.

[19] In my judgment, if the plaintiff's application is to be regarded as one under S. 14, then, despite the provisions of S. 17, the appeal was competent as a miscellaneous appeal against an order under S. 39 (1) (vi), and as the appellate order destroys the award itself, it is effective to destroy the decree filing the award.

[20] I now come to the alternative contention, that this was a suit altogether outside the Act, for enforcing an award made upon an oral reference, and so the provision against appeal in S. 17 has no application. I confess that in tackling this question and trying to ascertain the intention of the framers of the Act, I have at times felt inclined to throw up my hands in despair, and exclaim "God alone knows what they did mean." We Judges can only do our best. It may be regarded as settled that, so far as Sch. 2, Civil P. C., and the Arbitration Act of 1899 were concerned, an award based upon an oral submission or reference to arbitration was not touched, but was perfectly legal and valid, and the award could be enforced by suit, though not by the special procedure under the provisions of the Civil P. C., or the 1899 Act. That Act was regarded as not exhaustive even in the limited areas where it was applicable. The contrary view was taken by Beaman J. in *Rukhanbai* v. *Adamji*, 33 Bom. 69,[1] but that has been overruled in Bombay by a Division Bench in *Mathuradas* v. *Maganlal Parbhudas*, 58 Bom. 369[2] where it was definitely held that there is nothing in the Arbitration Act, 1899, or in S. 89 or in Sch. 2, Civil P. C., 1908, to suggest that an oral agreement to refer to arbitration is invalid. The Act of 1899 does not preclude an oral application.

[21] This view was also taken by the Madras High Court in *Ponnamma* v. *Marappudi Kotamma*, 56 Mad. 85,[3] and also in our own High Court in *Ramautar Sah* v. *Langat Singh*, A. I. R. 1931 Pat. 92.[4] The view there taken was that there is nothing in law which requires a submission of the dispute between the parties to arbitration to be in writing. A parole submission is a legal submission to arbitration.

[22] Has the position been altered by the Act of 1940 ? In my opinion it has. The Act of 1899 was described as "An Act to amend the law relating to arbitration", but the Act of 1940 is headed as "An Act to consolidate and amend the law relating to arbitration", and the preamble says "whereas it is expedient to consolidate and amend the law relating to arbitration in British India". It is an Act to consolidate the arbitration law. This suggests that it is intended to be comprehensive and exhaustive. The Legislators must have been aware that it had been settled that an award based upon an oral submission could be a valid award. It was known, therefore, that there were two sorts of valid award, and that to use the word "award" without more would, in the circumstances, be ambiguous; yet that is just how the word has been used. It would have been quite easy to say that "award" means an award based upon an arbitration agreement as defined in the Act, that is, a written agreement; but instead of that "award" is defin-

ed as "an arbitration award." It would also have been easy to clarify the position by providing, if that was the intention, that an award upon an oral submission would not be valid and enforceable. But nothing of the sort was done.

[23] After defining an award ambiguously, the ambiguous word is used in stringent provisions to prevent any procedure with reference to awards other than that provided in the Act. Section 47 lays down that, subject to the provisions of S. 46, which are in substance a provision for an arbitration clause in an Act to be treated as an arbitration agreement and which do not concern us—and save as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder. I find myself unable to construe the words "all arbitrations" otherwise than as including both arbitrations upon a written submission and on an oral submission.

[24] To the same effect is S. 26, which heads the Chapter or general provisions, and runs: "Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations."

[25] Section 30, which occurs in this General Chap. V, says that an award shall not be set aside except upon certain specified grounds, and if an award is used in the wide sense this would ban any suit outside the Act to set aside an award. Section 32, however, is much more specified. Its provisions are :

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

This appears to be intended to bar all proceedings outside the Act with reference to arbitrations.

[26] I think I am justified in holding, in view of these provisions, that the Act was intended to be exhaustive of the law and procedure relating to arbitration. I cannot imagine that the words "arbitrations" and "awards" could have been used in such specific provisions without more, specially having regard to the definition of award, if it was intended to leave it open to the parties to an award based upon an oral submission to proceed to enforce it or set it aside by proceedings by way of suit altogether outside the Act. Let us take it then that the Act intended that there should be no such proceedings.

[27] It does not follow from this, however, that it was intended to render awards based upon oral submissions illegal or invalid or unenforceable. *Prima facie* it might have been contemplated that awards based upon oral submissions were also to be enforceable under the procedure of the Act, though the Act has made it clear that, so far as the submission or arbitration agreement is concerned, if it is to be enforced under the Act it must be in writing. The Act takes no account of oral agreements, and defines "arbitration agreement" to exclude them.

[28] The problem whether it was intended that awards upon oral submissions could be enforced under the Act is a difficult one, but the opinion that I have formed is that that was not contemplated. The only provision for enforcement of an arbitration award made without the intervention of the Court is S. 14 (2). I am of opinion that this section can only be read as referring to awards based upon written arbitration agreements. The section cannot be read in isolation. Section 8 relates to the power of the Court to appoint an arbitrator or umpire, and clearly covers only cases where there is an arbitration agreement as defined in the Act. Section 9 provides for the appointment of new arbitrations in certain circumstances by the parties, but again relates only to arbitration upon a written agreement. Section 10 contains provisions regarding appointment of three or more arbitrators, and here again it is made clear that it is considering only appointments on an arbitration agreement. Section 11 uses the word "reference", but in the context it is clear enough that reference is to an arbitration agreement. Section 12 deals with the power of the Court to remove an arbitrator or an umpire.

[29] Section 13 defines the powers of the arbitrators or umpire. The use of the word "the" shows that "arbitrators" is used with reference to the arbitrators referred to in the preceding sections, namely, arbitrators upon a written agreement, and this is made even more clear by the words "unless a different intention is expressed in the agreement". Section 13 is manifestly thinking of such arbitrators or umpire only.

[30] Then comes S. 14, and begins "when the arbitrators or umpire". It seems to me clear, having regard to the use of the word "the", that only the same arbitrators are referred to, namely, those appointed in pursuance of an arbitration agreement which must be in writing.

[31] There is another clue in the wording of S. 14 (2) itself: "The arbitrators or umpire shall, *at the request of any party to the arbitration agreement* or any person claiming under such party, or if so directed by the Court" etc. etc. I feel confident that the reference again is only to arbitration upon a written agreement.

[32] It follows that the Act contains no provisions for filing any award based upon an oral submission.

[33] If then, as I have held, the Act is intended to be exhaustive, and contains no provisions

for the enforcement of an award based upon an oral submission, the only possible conclusion is that the Legislature intended that such an award should not be enforceable at all, and that no such suit should lie.

[34] In the light of all the above, let us next consider the nature of the proceeding with which we are concerned. No suit of the sort suggested would lie at all. No attempt was made to pay the court-fees upon such a suit, nor were any such demanded. The relief asked for was not the enforcement of the award, but filing it—the expression used in the Act. It is quite true the application was not strictly in accordance with the provisions of S. 14 (2) because the award was filed with the so-called plaint, and the Court was not asked for a direction upon the arbitrators to produce it. The parties were also spoken of as plaintiff and defendants. It is also true that, if my interpretation is correct, as an application under S. 14 (2) it was no more fit to succeed than as a suit. Nevertheless, I think, upon the whole it must be treated as a misconceived application under S. 14 (2). Having regard to the view I have taken of the law as enacted in the Arbitration Act of 1940, the Court could not entertain the matter except as an application under S. 14 (2). That being so, the written statement, as I have already held, incorporates an application to set aside the award, and the miscellaneous appeal was a competent appeal under S. 39 (1) (vi).

[35] I must observe, however, that in the alternative view if this be regarded as a suit outside the Act, then also the appeal was competent.

[36] The decision of the appellate Court, if my interpretation of the law is correct, was also right, though not necessarily for the reasons given in the judgment. In either view, the present application fails, and I would accordingly dismiss it with costs, assessing the hearing fee at six gold mohurs.

D. S. *Application dismissed.*

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**A. I. R. (35) 1948 Patna 435** *[C. N. 155.]*

RAY J.

*Panu Nayak and others — Petitioners* v. *Chintai Mallik — Opposite Party.*

Criminal Revn. No. 164 of 1947, Decided on 10-12-1947, from order of Addl. Dist. Magistrate, Cuttack, D/- 12-3-1947.

**(a) Evidence Act (1872), Ss. 101 to 103—Criminal trial—Prosecution for dismantling house of complainant and removing its materials — Accused pleading non-existence of house— Burden still lies on prosecution.**

Where in a prosecution for an offence under S. 379, Penal Code the complainant alleges that the accused dismantled the house of the complainant and removed its materials and the defence is that the house did not exist there the onus is still on the prosecution to establish that a house belonging to the complainant and in his occupation did exist at the time of occurrence. [Para 8]

Annotation:— ('46-Man) Evidence Act, Ss. 101 to 103 N. 3.

('46 Com), Criminal P. C. S. 256 N. 10, S. 367 N. 6.

**(b) Criminal P. C. (1898), S. 423 (1) — Powers of appellate Court in appeal from acquittal and those in appeal from conviction are distinct and separate —Acquittal includes partial acquittal.**

The powers of the appellate Court in an appeal from an order of acquittal and those in an appeal from a conviction should be kept distinct and separate as they are mutually exclusive. An order of acquittal for the purposes of an appeal need not necessarily be acquittal of all charges for which the accused is tried in one trial but an order of partial acquittal as well. [Para 10]

**(c) Criminal P. C. (1898), S. 423 (1) (b) — 'Alter the finding' — Finding means finding of conviction and not of acquittal.**

The words "alter the finding" in S. 423 (1) (b) (2) should not be dissociated from the context in which they appear. With reference to the finding, the appellate Court is given two sorts of powers, that is of reversal, and of alteration. It would be unnatural to say that the words "the finding" occurring after the word 'reverse' have a meaning different from the words "the finding" occurring after the word 'alter'. The very conception of a 'finding' within the meaning of clause (b) of sub-s. (1) of S. 423 is one of conviction. The clause opens with the words "in an appeal from a conviction". The words preclude any idea of an order of acquittal. Hence the word 'finding' in S. 423 (1) (b) (2) must mean a finding of conviction and not of acquittal: *Dissentient view of Mulla and Hamilton JJ. in* 31 A.I.R. 1944 All. 137 (F.B.), *Rel. on.* [Para 11]

Annotation:— ('46-Com) Cr. P. C. S. 423 N. 31.

**(d) Interpretation of statutes—Words in statute should be given same meaning throughout.**

The words occurring in a statute ought not to be so interpreted as to have both wider and narrower meaning in some or other of the case to which it applies. The words have the same meaning uniformly whenever the statute applies, if it applies at all. [Para 14]

Annotation :—('46-Com) Cr. P. C. Pre N. 7 pt. 67.

**(e) Criminal P. C. (1898), S. 423 (1) (b) — Trial under S. 379, Penal Code—Conviction under S. 426 — Appellate Court held had no power to convict accused under S. 379.**

The accused was tried for an offence under S. 379, Penal Code, but was convicted of an offence under S. 426, Penal Code. The appellate Court altered the finding of the trial Court and substituted for it a finding of guilty under S. 379:

*Held*, that as a conviction under S. 379, Penal Code could not be substituted for a conviction under S. 426, Penal Code on the same facts in view of the provisions of Ss. 237 and 238, Criminal P. C., the appellate Court had no power to convict the accused under S. 379, Penal Code: 22 Cal. 377, *Rel. on.* [Para 18]

Annotation:—('46 Com) Cr. P. C. S. 423 N. 31 Pt. 8.

*Cases referred:*—

1. ('44) 31 A. I. R. 1944 All. 137 : I. L. R. (1944) All. 403 : 215 I. C. 213 : 46 Cr. L. J. 38 (F. B.), Zamir Qasim v. Emperor.
2. ('96) 23 Cal. 975, Queen-Empress v. Jabanullah.
3. ('95) 22 Cal. 377, Krishna Dhan Mandal v. Queen-Empress.

*D. Sahu* — for Petitioners.

*P. Sen* —for Opposite Party.

**Order.**— This revision is directed against the conviction of the petitioners under S. 379, Penal Code, by the lower appellate Court and the sentence of fine of Rs. 30 each imposed upon them.

[2] The petitioners had been put on trial for for an offence under S. 379, Penal Code. The learned trial Court, however, disbelieved that part of the prosecution case which would make the offence one under the section, but believed the allegations which made out an offence under S. 426, Penal Code and convicted them under that section and sentenced them as above.

[3] The learned lower appellate Court, however, altered the finding of the trial Court and substituted for it a finding of guilty under S. 379, Penal Code. Hence, this revision.

[4] It has been contended that the learned trial Court having acquitted the petitioners of the offence under S. 379, Penal Code, the learned lower appellate Court had no jurisdiction to convict them under that section. With this submission it is contended that the conviction of the petitioners is bad and must be set aside.

[5] In order to judge the merit of this contention, it is necessary to bear in mind the allegations on which the accused were prosecuted and how much of them were found to be true by the trial Court or by the lower appellate Court. The facts leading to the prosecution were that petitioner 1 Panu Naik was a raiyat in respect of plot No. 1044 with an area of .08 of an acre in mouza Jaipur. One Ghanei Mallik was a sikmi tenant under him, and had his residential house on the land comprising plot No. 1044. Ghanei died about 12 years back, and the complainant Chintai alias Chintamani Mallik claims to be his adopted son. Chintai was in occupation of the house but refused to serve his landlord Panu. On account of this Panu, his sons Baikuntha and Ram Krishna and their servant Nari Jena dismantled the house on the land and removed all the building materials and other moveable properties of the complainant to Panu's house. Besides, an earthen pot and a drum were taken by the servant Nari Jena to his own house. On these facts the accused persons were tried for an offence under S. 379, Penal Code, but were convicted under S. 426, Penal Code. Nari Jena, who made a confessional statement implicating himself and other accused persons in the lower Court did not come up in appeal nor has he come up in revision. The defence is that the whole case has been falsely engineered by the zamindar's Tahasildar Abhoy Charan Das.

[6] In appeal before the Court of appeal it was contended that the trial having been for the offence under S. 379, Penal Code, the conviction under S. 426, Penal Code, was illegal, and was not warranted by the provisions of Ss. 237 and 238, Criminal P. C., as they did not apply to the facts of the case, the offence of mischief neither being cognate nor minor to the offence of theft. The learned lower appellate Court, however, pronounced that he would not consider this contention as he was of opinion that the petitioners should be convicted under S. 379, Penal Code.

[7] The learned lower appellate Court's finding of facts is open to serious objections as he did not legitimately come to the finding after due consideration of evidence. In considering the defence case he observes:

"When the defence alleged that the house did not exist for 10 years, the onus lay heavily on them to prove this assertion and that onus has not been discharged."

[8] This is no doubt a wrong approach. Notwithstanding the defence plea, the onus was on the prosecution to establish that a house belonging to the complainant and in his occupation did exist at the time of the occurrence. The appellate Court has misdirected itself in failing to appreciate what the prosecution had to establish in this case. With regard to the prosecution evidence, he comes to the conclusion in the following passage:

"There is evidence on record that all these 3 accused persons took part in the theft and they were implicated by their co-accused Nari Jena. The evidence proves the charge of theft and I, therefore, alter the finding and conviction to charges of theft under S. 379, Penal Code as against all the accused persons including the present appellants and maintain the sentence of fine against all of them."

[9] The trial Court summarised its finding in the following words:

"I have weighed the evidence on the record very carefully and have considered the broad circumstances and probabilities of the case. I am convinced that the accused persons did pull down the house of P. W. 1 when he was in lawful possession of it, and carry away the house building materials and other articles. In their act of highhandedness the accused persons appear to have been actuated by the motive of mischief only. Hence, I find the accused persons guilty under S. 426, Penal Code, and convict them thereunder."

[10] It appears quite plain from the above summary that he did not find it as a fact that the accused persons after demolishing the house and removing the moveables in the house belonging to the complainant removed them to the house of Panu Naik, petitioner. His finding is to the effect that the household articles inside the house and the building materials were thrown away with the intention of causing mischief to the complainant, the whole object of the landlord Panu Naik and his men being to dispossess the complainant who was claiming to remain on the land as a sikmi tenant against the consent of his landlord. In short, according

to the trial Court any act that should have established dishonest intention, that is, intention of causing either wrongful loss or wrongful gain was not proved by the prosecution. I have set out above the conclusion of the learned lower appellate Court. He has not, in altering the finding of the Court below, recorded any finding on the evidence of the prosecution that any act of theft with the intention of causing wrongful loss or wrongful gain was in fact committed. However, assuming that he has done so, the question to be determined is whether in law he can do so. It is clear, on the face of the record that the lower appellate Court gave the accused no notice of his intention to alter the finding of acquittal of the offence of theft into one of conviction of the same offence, and thus prejudiced their defence. The usual method of getting an order of acquittal set aside is by preferring an appeal under S. 417, Criminal P. C. It has been contended, however, by Mr. Sen appearing for the opposite party that a Court of appeal, in exercise of his powers under S. 423, Criminal P. C., can alter a finding of acquittal into one of conviction. Section 423, sub-s. (1), para. 1 provides for appeals both against an order of conviction as well as against an order of acquittal, and in cls. (a), (b), (c) and (d) incorporates what the appellate Court can do in the appropriate cases. Accordingly, in cl. (a) it defines the powers of the appellate Court in an appeal from an order of acquittal, (b) in an appeal from an order of conviction, (c) in an appeal from any other order and (d) empowers the Court to make any amendment or any consequential or incidental order that may be just and proper. Naturally enough, the powers of the appellate Court in an appeal from an order of acquittal and those in an appeal from a conviction should be kept distinct and separate as they are mutually exclusive. It has been settled beyond controversy that an order of acquittal for the purposes of an appeal need not necessarily be acquittal of all charges for which the accused is tried in one trial but an order of partial acquittal as well.

[11] Very strong reliance has been placed by Mr. Sen on a Full Bench decision of the Allahabad High Court in A. I. R. 1944 ALL. 137.[1] In this case all the Hon'ble Judges that constituted the Bench were not unanimous, Mulla and Hamilton JJ. dissented from the majority view which, no doubt, supports Mr. Sen's contention. I venture, however, to agree with great respect with the dissentient view of their Lordships, Mulla and Hamilton JJ. and will give my reasons herein below. The basis of the decision of the majority, as well as, of all other decisions of other Courts in which the same view has been taken is mainly that the words "alter the finding maintaining the sentence" cannot be construed narrowly so as to mean the finding of conviction and not of acquittal. As against the contention based upon the principle of *autre fois acquit* it has been said that an appeal is a continuation of the same trial, and alteration of a finding of acquittal into one of conviction, in an appeal from conviction, does not violate the principles laid down in S. 403, Criminal P. C. I would, however, venture to think that the words "alter the finding" should not be dissociated from the context in which they appear. With reference to the finding, the appellate Court is given two sorts of powers, that is of reversal, and of alteration. It would be unnatural to say that the words "the finding" occurring after the word 'reverse' have a meaning different from the words "the finding" occurring after the word 'alter'. The very conception of 'a finding' within the meaning of cl. (b) sub-s. (1) of S. 423 is one of conviction. The clause opens with the words "in an appeal from a conviction." These words preclude any idea of an order of acquittal. Immediately after the said opening words appear

"(1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial."

The words "the finding and sentence" in this part of the clause can have no reference to any other finding than one of conviction. This conclusion is reached not only because of the natural meaning to be attached to the words used but also because of the word 'conviction' immediately preceding the words 'reverse the finding.' The article 'the' before the word 'finding' has its significance in importing the definite meaning of finding of conviction to it. In this setting occur the words that follow, namely, 'alter the finding.' The words 'the finding' cannot, with due regard to the rules of grammar, and the rules of analysis and synthesis of sentences can mean any finding other than "the finding' in the earlier part of the sentence. Besides, that 'the finding' in the words 'alter the finding' would mean a finding of conviction also follows from the words that follow them, namely, "maintaining the sentence." All the words put together are 'alter the finding maintaining the sentence.' The finding here cannot mean a finding to which no sentence is attached. It is clear that the finding and the sentence must go hand in hand, and the appellate Court is given the power to alter the finding but to maintain the sentence or reduce the same. "Alter the finding of acquittal" maintaining the sentence would be completely meaningless. The word 'alter' cannot

include reverse. It will simply mean changing the form of the finding from one to another. In case the word 'finding' is construed as a finding of acquittal, the word 'alter' would necessarily mean to reverse the finding of acquittal and substitute a finding of conviction. If the Legislature so intended it could have expressly said so.

[12] The argument, that has found favour with the school of thought that is of opinion that the Court of appeal has the power to reverse a finding of acquittal and substitute in its place a finding of conviction, mainly, is that there is nothing in the section which would import any alterations in the meaning of the words 'alter the finding'. But this argument cannot be sustained in all cases and in all circumstances. In 23 Cal. 975[2] Banerji J. had to concede that interpretation of the words 'alter the finding maintaining the sentence' is not free from limitation but is subject to some restrictions in particular cases. I would quote the passage :

"Section 423, cl. (b) has no such restriction imposed upon it. There is, under that clause, only one restriction to the power of the appellate Court on an appeal from a conviction, and that is that it cannot enhance the sentence. It is possible to imagine cases in which this restriction may stand in the way of the appellate Court's altering the finding. Thus, if an accused person is charged with having murdered *A* and also with having caused grievous hurt to him, and is acquitted of the former offence but convicted of the latter and sentenced to seven years' rigorous imprisonment by the first Court, the Appellate Court cannot, on the appeal of the accused, alter the finding into one of guilty of murder, because as it cannot enhance the sentence, the result will be that a person convicted of murder, for which the only punishment is either death or transportation for life, will be punished merely with imprisonment for seven years—a sentence which is not in accordance with law. That, however, is not the case here, and so we need not consider it further. But in a case like this, in which no such difficulty arises, I think the Appellate Court, can in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of any offence of which he may have been acquitted by that Court."

[13] From this it is clear that the power of the Appellate Court to reverse a finding of acquittal is not exercisable in all cases but in some only. Similar is the observation of O'Kinealy J. in the same case at page 978 of the report where he says :

"The power of the Court to alter the finding, therefore, is not limited in the manner claimed by the appellants. There are no doubt some cases to which this procedure would not be appropriate. That depends upon different considerations."

[14] If this be so, I should with the greatest deference to the learned Judges say that the construction accepted by them is an artificial one. It is assumed, as if the Legislature gave a wider power to the Appellate Court in some cases, and much lesser power in certain other cases. The words occurring in a statute ought not to be so interpreted as to have both wider and narrower meaning in some or other of the case to which it applies. The words have the same meaning uniformly whenever the statute applies, if it applies at all.

[15] In 22 Cal. 377[3] it has been observed:

"When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the Appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. the interference of the Appellate Court in such a case is directed primarily not against the acquittal but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the Appellate Court must deal with the whole case."

[16] With these obrervations, with the greatest respect, I entirely agree. It is only in cases contemplated in these observations that seemingly an order of acquittal of an offence against one section is changed into an order of conviction of an offence against another section. Here in fact, the finding remains the same but the punishable section is different.

[17] No case of the Patna High Court having a contrary view has been invited to my attention. Besides, the reasons given by me, I would adopt those given by Mulla and Hamilton JJ. in the Allahabad Full Bench case.

[18] In my view, therefore, as a conviction under S. 379, cannot be substituted for a conviction under S. 426, on the same facts, in view of the provisions of Ss. 237 and 238, Criminal P. C. I hold that the learned lower Appellate Court had no power to convict the petitionor under S. 379, Penal Code. In the particular circumstances of this case already set out above I do not think it worth while to send the case back to the Appellate Court to consider whether a conviction under S. 426, Penal Code, as recorded by the trial Court should be maintained.

[19] In the result, the conviction and sentence passed against the petitioners are set aside and they are acquitted of all the charges framed against them. Their petition is allowed and the rule is made absolute.

K.S. *Accused acquitted.*

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**A. I. R. (35) 1948 Patna 438** *[C. N. 156.]*

RAY J.

*Kamakhya Narain Singh — Appellant* v. *Harkhu Singh — Respondent.*

A. F. A. D. No. 976 of 1946, Decided on 10-10-1947, from decision of Addl. Sub-Judge, Hazaribagh, D/- 11-4-1946.

**(a) (Bihar) Court of Wards Act (9 [IX] of 1879), S. 18 — Benefit of property and advantage of ward — Wisdom of the authority concerned must be presumed regarding its decision.**

**In deciding whether the doing of a particular act is for the benefit of the property and the advantage of the ward a considerable amount of latitude must be permitted to the authority concerned. The wisdom and sagacity of the said authority must be presumed.**

**In cases of a small area of zirat land and with good capacity for productivity it may be prudent management to preserve the land by granting settlement on bhaoli rent by registered leases for terms of years. But where the area is vast and productivity is low it looks *prima facie* wiser to settle on cash rent on terms of fixity of tenure than on bhaoli rent.** [Para 5]

**(b) (Bihar) Court of Wards Act (9 [IX] of 1879), S. 70 — Rules under — Rules defining powers of manager are binding on him.**

**The rules framed under S. 70, defining the powers delegated to the Manager are binding on the Manager, though they may not have the force of law so far as third persons are concerned.** [Para. 7]

**(c) (Bihar) Court of Wards Act (9 [IX] of 1879), S. 70 — Rules under — R. 228 (Court of Wards Manual, 1927)—Non-compliance with—Lease is ultra vires.**

**Non-compliance with the procedure prescribed in R. 228 makes the settlement *ultra vires* : 35 A. I. R. 1948 Pat. 160 and S. A. No. 977 of 1946, *Foll.*** [Para 9]

**(d) Interpretation of statutes — Definition of powers in statutes—Existence of powers not to be inferred from omissions.**

**When the powers are defined under a statute or under statutory rules, their existence ought to be looked for in what has been said in the statute or the rule, as the case may be and not by implication from omission. Express negation or clear omission may certainly be taken into consideration in construing ambiguous or equivocal expressions occurring in statutes or rules defining the powers. But the existence of certain powers cannot be argued inferentially from omissions of what could have been, if so intended, expressly provided : L. R. 7 Eng. & Ir. Appeal Cases 653, *Rel. on.*** [Para 11]

**Annotation : ('44-Com.) Civil P. C. Pre. N. 7.**

**(e) (Bihar) Court of Wards Act (9 [IX] of 1879), Ss. 18 and 70—Limitations on settlements—Limitations provided for — No other limitations can be implied.**

**When the Manager has been delegated the power to sanction settlement and the limitations to this settlement have also been provided for in R. 72 framed under S. 70 in 1927, no other limitations can be implied simply because according to the Chota Nagpur Tenancy Act (6 [VI] of 1908) such limitations will be more beneficial in the interest of the disqualified proprietor.** [Para 11]

*Cases referred* :—

1. ('28) 7 Pat. 649 :15 A. I. R. 1928 P. C. 146:55 I. A. 212 : 109 I. C. 663 (P.C.), Kamakhya Narain Singh v. Ram Raksha Singh.
2. ('30) 9 Pat. 347 : 16 A. I. R. 1929 Pat. 460:118 I. C. 316 (F.B.), Tengam Sukul v. Chatthu Bhar.
3. *Reported in* ('48) 35 A. I. R. 1948 Pat. 160 : 26 Pat. 143, Kamakshya Narain Singh v. Kheyamian.
4. Second Appeal No. 977 of 1946, D/- 20-8-1947 (Pat.), Kamakshya Narayan Singh v. Kanti Kumar.

*L. K. Jha and Shambhu Prasad Singh* — for Appellant.

*B. C. De and A. K. Chatterji* — for Respondent.

**Judgment.** — This is a plaintiff's second appeal instituted in a suit for declaration of title to and recovery of possession of 22.36 acres of zirat lands on setting aside settlement thereof with the defendant-respondent by the Court of Wards. The plaintiff's estate was under the management of the latter from 1913 to 1937. The impugned settlement was effected by the Manager, Court of Wards in the year 1923. The plaintiff on attainment of majority and his assumption of the management of the estate has brought this suit within three years. Thus the suit is in time. The plaintiff's attack on the settlement is based on the grounds, *inter alia*, that the settlement was prejudicial to the interest of the ward's estate, and that the manager in effecting the settlement exceeded the limits of his power. The defence, on the other hand, is that the settlement was effected by way of the *bona fide* settlement of a dispute between the estate and the defendant, in consideration of the defendants's surrender of his mokarrari rights to the estate. Hence, he claimed occupancy right in the lands and advanced plea of estoppel against the plaintiff grounded on his subsequent ratification of the settlement and recognition of the holding. The other contentions raised in the defence were not pressed in the Courts below and have not been taken up in this Court.

[2] Before the trial Court, there was an issue of limitation; that too has since been abandoned. The material issues on which the parties went to trial were :

"2. Is the settlement of the suit land with the defendant valid, legal and binding on the plaintiff ?

3. Has the defendant acquired occupancy right in the suit land ? If so, can he be ejected ?

4. Is the plaintiff entitled to mesne profits ? If so, what amount.?"

The trial Court answered the first two issues in the negative and the last one in the affirmative. The reasons assigned by the trial Court were : (1) that the settlement with the defendant was not for the benefit of the estate; (2) that the manager was not vested with the power of making permanent settlement of lands (vide Rr. 70 and 228, Court of Wards Manual 1927, corresponding to Rr. 65 and 241 of the Manual of 1941); (3) that the settlement being prejudicial to the interest of the Ward's estate, was not sanctioned by S. 18, Court of Wards Act; (4) that though ordinarily under the provisions of Chota Nagpur Tenancy Act the defendant would acquire occupancy right in the lands by the lapse of 12 years under S. 17, Chota Nagpur Tenancy Act, in the present case the plaintiff's disability lasted till the year 1937 which prevents the acquisition of such right in favour of the defendant and (5) the conclusion in favour of the plaintiff's right to khas possession necessarily entitles him to mesne profits according to the claim at Rs. 35.15.0 per annum.

[3] With the above findings, the trial Court decreed the plaintiff's suit. The defendant then

preferred an appeal. Before the learned lower appellate Court two points were pressed : One was existence of manager's power to settle the lands. The second was the plaintiff's recognition and ratification of the settlement giving rise to estoppel against him. On the first point the Court held :

"Thus from the above it is clear that the manager had power to create occupancy holdings rent of which did not exceed Rs. 50."

In coming to this conclusion the learned lower appellate Court has held the rules framed under S. 70 of the Act questionable in the civil Court; that they have not the force of law so as to override or restrict the powers of the manager in creating leases or farms by virtue of S. 18 of the Act in exercise of the powers delegated to him; that the rules are mere matters of procedure without any effect on the rights of a third party; and that the transaction in question was for the benefit of the estate and advantage of the ward within the meaning of the latter part of S. 18 of the Act. Regarding the contention as to estoppel, he agreed with the learned Munsif. In the result, he found that the Munsif had committed an error in construing the law and granting the plaintiff a decree.

[4] The plaintiff in second appeal has stressed two points, namely, incompetence of the manager to settle, and prejudicial character of the settement to the interest of the estate.

[5] I view the determination of the question as to beneficial and advantageous character of the settlement or otherwise as basic in the case. I should, therefore, address myself first to this aspect of the question. The determinative facts are : (1) that the defendant from the time of his ancestor was holding mokarrari interest in the village since its creation in the eighties of the last century. In order to indicate the danger to the estate in the ancient character of the mokarrari interest, Mr. De invited my attention to a decision of the Privy Council in 7 Pat. 649[1] where it was held :

"Where on the death of the grantee of a mokarrari istimrari patta, which upon its true construction is for life only, his heirs or assignees remain in possession claiming contrary to the contention of the grantor that the patta is permanent and heritable, they do not become tenants from year to year either under S. 116, T. P. Act, 1882, or otherwise by operation of law. The possession of the heirs or assignees, and of those claiming from them, is adverse to the grantor for the purpose of the Limitation Act, 1908, Schedule 1, Art. 144, unless the grantor has recognised the existence of a tenancy so that the relationship of landlord and tenant is created."

The core of Mr. De's contention is that the estate manager in order to avoid the risk of the estate having had to lose the entire village, entered into an arrangement with the mukarraridars. By virtue of this arrangement renunciation of mukarrari right on the part of the defendant formed the consideration for the permanent settlement in raiyati right of the lands in dispute. The learned lower appellate Court in coming to his finding in favour of prudentiality of the settlement has given due recognition to this aspect. After adverting to the provisions of S. 18 requiring the Court to do all such acts as it may judge to be most for the benefit of the property, and for the advantage of the ward, the learned lower appellate Court proceeds :

"From the record it transpires that the suit lands which lie in village Lawalaung were formerly the mokarrari istamrari of the ancestors of the defendant and after the death of the mokarraridar, Ramgarh Estate resumed khas possession. Subsequently, the defendant paid the entire arrears of rent amounting to Rs. 3639-4-6 and in consideration of this the manager settled the entire area of lands in possession of the defendant in raiyati by virtue of a hukumnama.

It is contended by the defendant that the settlement was made with him at a double rate of rent prevailing in the thana. The respondent has not adduced any evidence in the lower Court to prove that the statement of the defendant is wrong."

The learned lower appellate Court has also come to a finding in consideration of the yield of the paddy lands of the locality as to the appropriateness of the rental of Rs. 35-15-0 per annum. He has also found that it was not possible for the manager of the Court of Wards to bring under direct cultivation in 1923 vast tracts of land lying within the radius of about 65 miles from Hazaribagh town. The only possible way of prudent management according to him, was to let them out either for a term of years or permanently for the purpose of cultivation. This finding of the learned lower appellate Court has been challenged vigorously by Mr. Jha, counsel for the appellant. Before proceeding to consider his contention on its merit, I should observe that according to S. 18 it is (for ?) the Court or whosoever acts in exercise of the powers delegated by the Court to exercise his individual judgment, if not discretion, in deciding whether the doing of a particular act is for the benefit of the property and the advantage of the ward. This principle is deducible from the language employed by the Legislature in enacting S. 18 of the Act. I consider this section to be the keynote to the legislation providing for proper management of ward's estate by the Court. The material part of the section is phrased as follows :

"The Court may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

I lay emphasis upon the words "as it may judge." I shall not be understood to say that the Court should in all circumstances be considered to be the final Judge; but at the same time it would not be correct to hold that the civil Court, while

sitting on judgment upon the prudent character of any act of the Court, it will weigh the matter with a golden scale. A considerable amount of latitude must be permitted to the authority concerned. The wisdom and sagacity of the said authority must be presumed. Mr. Jha contends that the only prudent management of a ward's estate (proprietary) is to preserve the zirat lands by granting settlements on bhaoli rent by registered leases for terms of years. In the absence of the Court of Wards, it is difficult to appraise the value of this contention. In cases of a small area of zirat lands and with good capacity for productivity the argument may prove appropriate. Where the area is vast and productivity is low, as it is in the present case, it looks *prima facie* wiser to settle on cash rent on terms of fixity of tenure than on bhaoli rent. In case of adopting of the latter course, costs of management and the risk of non-realisation and consequent involvement of the estate in financial embarrassment due to litigation present the other side of the picture. I do not, therefore, accept the soundness of Mr. Jha's contention. Besides, that the settlement is not an imprudent one and that it was arrived at in course of *bona fide* management of the estate for the benefit and advantage of the ward's estate is a finding of fact which is binding in second appeal. That the lands could have been leased out more advantageously and beneficially in a different manner turns out to be more or less a speculation in this case in the absence of any materials which can prove countervailing factors to the ones on which the finding of the Court of appeal below is based. I would, therefore, refuse to depart from or disagree with the finding of the lower appellate Court as to the beneficial and advantageous character of the settlement in question.

[6] Mr. Jha further argued that according to the judgment of the appellate Court the settlement took place subsequent to resumption of the mokarrari interest, and that there is nothing to connect the two acts. This again is a question of fact, and according to the final Court of fact, the two are connected with each other as one being either the consideration or costs for the other. Mr. De cites a decision in 9 Pat. 347[2] to show that there is no absolute bar to the accrual of occupancy rights in zirat land and the only bar to such acquisition is by granting leases for a term of years or under a lease from year to year. This I consider does not help his argument. It is not to be forgotten in this connection that the lands were zirat lands of the mokarraridar and not of the proprietor. They were so recorded long after the creation of the mokarrari in 1864 and during the subsistence of the mokarrari interest. The record of rights in which the lands were recorded as zirat was published in the year 1910-1911.

[7] The next question whether the manager overstepped the limits of his delegated powers must be considered in the background of the fact that the settlement was *bona fide* (?), beneficial and advantegeous to the wards' estate. For the purpose of establishing that the settlement was *ultra vires* the powers of the manager, reliance has been placed upon certain rules framed under S. 70 of IX (B.C.) of 1879 (Court of Wards Act). The section so far as is material for the purpose in hand reads :

> "The Court may make rules consistent with this Act and generally for the better fulfilment of the purposes of this Act. The Court may from time to time alter, add to, or repeal such rules."

The learned lower appellate Court has entered into a long discourse regarding the legal efficacy of these rules. He is of opinion that as there is nothing in the statute providing that these rules will have the force of law, he should not ascribe such force to these rules. Though I am not inclined to overrule this view as completely baseless, I consider the rules binding, confining myself to the rules with which I have to deal inasmuch as they define the powers delegated to the manager. In this connexion reference may be made to S. 15 of the Act. It provides that the Court may exercise all or any powers conferred on it through the Commissioners of the divisions or the Collectors of the district in which any part of property of the disqualified proprietor may be situated or through any other person whom it may appoint for such purpose. The manager appointed by the Court of Wards is "any other person appointed for such purpose." Paragraph 2 of S. 15 provides :

> "The Court may from time to time delegate any of its powers to such Commissioners or Collectors or other person as aforesaid and may at any time revoke such delegation."

The question, therefore, resolves into this that when the Court purports to exercise any of its powers through any of the persons indicated in the section, that exercise must be by observance of rules framed by it. The result, therefore, is when the officer concerned does not exercise the powers of the Court in accordance with the rules made by the Court, it cannot amount to exercise of power by the Court through him. Similarly with regard to delegation of powers, the Court has delegated powers through the agency of the Rules. When the officer does not observe the rules, he does not exercise the power delegated to him. Without the delegated powers the officer is *functus officio*. Viewed in this light, the rules are binding on the Manager. They may not have the force of law so far as third persons are concerned as held in a decision

of the Calcutta High Court referred to in the judgment of the learned lower appellate Court. The relevant rules discussed at the Bar and relied upon by the Courts below are Rr. 72 and 228. Rule 72 is one of the rules under the heading "under Cl. 2 of S. 15 of the Act the Court has delegated the following powers to managers." Rule 72, as it stood at the time of the settlement, was:

"Under S. 18 to sanction settlement or resettlements of raiyats' holdings either at higher or lower rents than were paid previously, and to sanction reductions of rent due to relinquishment of holdings, deaths and desertion of raiyats, diluvion of lands or to any other cause, when the rental of each holding so settled or resettled does not exceed Rs. 50 and the reduction in each holding is less than Rs. 10. The reduction in any one year should not exceed Rs. 100 and must be reported to the Collector. When the holding is mukarrari, the Commissioner's sanction is required to resettlements or reductions in rent."

[8] This rule was replaced by correction slip NO. 48, dated 15-7-1926, which reads:

"Under S. 18 to sanction the creation of occupancy or non-occupancy holdings or the resettlement of holdings with occupancy or non-occupancy raiyats at higher or lower rents than were paid previously and to sanction reductions of rent due to relinquishment of holding, death and desertion of raiyats, diluvion of lands or any other cause, when the rental of each holding so created or resettled does not exceed Rs. 50 and the reduction in each holding is less than Rs. 10. The reduction in any one year should not exceed Rs. 100 and must be reported to the Collector. When the holding is mokarrari, the Commissioner's sanction is required."

As I have already said, the rule is nothing but definition of the powers delegated to the manager in the matter of settlement and resettlements. The rule opens with the words: "Under S. 18." The opening words signify that the manager is to do any of the acts referred to in the rule only when he judges the act to be most for the benefit and advantage of the minor. Two things arise out of this namely, (1) that he is the Judge as to the beneficial and advantageous character of the settlement; and (2) that besides other limits to his power, the provisions of S. 18 would be the determining factor in matters of the manager's competency. The rule limits the power of settlement of holdings to cases when the rental of each holding does not exceed Rs. 50. Coming to the facts of the present case, it is a case of settlement of raiyati holding the rent of which is Rs. 35-15-0. The settlement, therefore, is within the delegated powers of the manager. I have quoted the substituted Rule 72 in order to show that the latter is not only different from the former but is clearer. Reading the two together, it is clear to me that within R. 72 then prevailing, the manager had the power to create an occupancy holding the rental of which does not exceed Rs. 50. He could do so without any reference to either the Collector or the Commissioner or the Court. So long as he acted as a delegate, his act is on the the same footing as an act done by the Court. The only contention advanced to show that the manager exceeded his delegated powers is directed against the beneficial character or otherwise of the settlement. This contention must be overruled for the reasons already advanced for upholding the finding of the Court of appeal below that the settlement was a prudent one.

[9] The next rule is 228. The marginal note to this rule reads: "Procedure for grant and registration of leases." How far non-compliance with this rule vitiates a settlement made by a manager does not, in my opinion, fall to be considered in this case. Rule 72 defines the power, while this rule merely provides for a procedure of exercise of that power. If it was intended that the powers delegated in R. 72 will be either governed or restricted by this procedural rule, we should expect something more express than is to be found in the rule itself. Free of any authority, I would hold that any mistake in the observance of a procedure prescribed in this rule will not make the act of the manager ultra vires or void. I am, however, bound by two Division Bench cases of this Court: S. A. 157 of 1944[3] and S. A. 977 of 1946.[4] The former lays down directly that non-compliance with R. 241 of a later manual, which corresponds to R. 228 with which I am dealing makes the setlement of the zirat land ultra vires. In that case in settling a zirat land the lease was effected without a registered document. This was in direct contravention of the procedural rule. In the other case, the questions for consideration were whether the rules were ultra vires and whether the permanent lease was in accordance with the rule. The Court held that the rules were not ultra vires. In this connection reliance was placed on the unreported decision just stated above. With regard to the granting of the permanent lease, it was held that under ordinary circumstances, the manager had no power to grant such lease. Manohar Lall J. observed:

"Has the rule then been complied with in this case? To begin with, the impugned lease is a permanent lease. Therefore, the rule is at once infringed. No facts have been found or brought to our notice to show that any extraordinary circumstances existed in this case, e. g., the necessity or the benefit to the estate which rendered such a transaction (wholly abnormal and extraordinary) essential for the good of the estate."

[10] None of the decisions, however, hit the present impugned settlement. This settlement has been effected by a registered kabuliat as required under R. 241. Secondly, the circumstances influencing the settlement are far from ordinary. It has been found to be for the benefit of the estate in the logical analysis of the facts and circumstances that constitute the context in

which the lease was granted. Taking the view that R. 228 does in a limited sense, control R. 72 to a certain extent, the present settlement has not been affected in contravention of the said rule.

[11] Mr. Jha has taken me through certain sections of the Chota Nagpur Tenancy Act in order to demonstrate how accrual of occupancy right can be prevented in respect of the landlord's privileged (zirat) lands. The basis of his contention is that under all circumstances, such precautions as will prevent accrual of occupancy rights in zirat lands should be taken by a manager of the Court of Wards: that whenever and wherever such precautions are not taken the settlement would be beyond the powers of the Court. This is an argument which I am not advised to countenance. I have given my reasons to show that in the present case the settlement was rather for the benefit and advantage of the ward's estate than otherwise. Mr. De contends that the "Court" must be credited with the knowledge of the provisions of the Chota Nagpur Tenancy Act. In such circumstances, if the Court at all intended that no settlement for creation of occupancy rights in zirat lands should be effected through the Court's management, it should have said so expressly. To meet this argument, Mr. Jha has cited certain authorities including L. R. 7 Eng. & Ir. Appeal Cases 653 at p. 657 to establish that no inference can be drawn from omissions. I quite agree. When the powers are defined under a statute or under statutory rules, their existence ought to be looked for in what has been said in the statute or the rule, as the case may be, not by implication from omission. Express negation or clear omission may certainly be taken into consideration in construing ambiguous or equivocal expressions occurring in statutes or rules defining the powers. The existence of certain powers cannot be argued inferentially from omissions of what could have been if so intended, expressly provided. But here in this case the manager has been delegated the power to sanction settlement. What are the limitations to this settlement have also been provided for in R. 72, and I have already dealt with these limitations. Besides them we cannot imply other limitations simply because according to the tenancy law, such limitations will be more beneficial in the interests of the disqualified proprietor. Whether such limitations will be introduced into the rule because their introduction would make the management more beneficial to the ward's estate, in the light of the provisions in the Chota Nagpur Tenancy Act barring accrual of occupancy rights in zirat lands, is well answered by the limitations, provided in S. 18 of the Act, to the General Power of the Court which also applies to the powers of the Court's delegates. Whether a precaution should be taken in a particular case, to prevent accrual of occupancy in respect of some zirat lands will be a matter for judgment of the officer concerned within the meaning of S. 18 of the Act. How far the civil Court can interfere with such judgment has already been dealt with by me.

[12] Under the circumstances, I find no merit in this appeal which is, therefore, dismissed with costs.

D. H. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 443** *[C. N. 157.]*

AGARWALA AG. C. J. AND MEREDITH J.

*Rajib Nath Mukherjee—Appellant* v. *The Chota Nagpur Banking Association Ltd. and others—Respondents.*

Letters Patent Appeal No. 23 of 1946, Decided on 5-1-1948, from judgment of Shearer J., *Reported* in 34 A. I. R. 1947 Pat. 40.

(a) Company—Articles of Association—Company given prior lien on shares for debts owed by share-holder to company—Power to sell shares for satisfying debt without further consent of share-holders, also given—Company suing share-holder for debts and obtaining decree—Shares put to sale in execution free of encumbrance—There was held waiver of lien—Lien held could not be exercised after decree : 34 A. I. R. 1947 Pat. 40, REVERSED.

Under an article of association of a Bank, the Bank had a prior lien on the shares of each share-holder for all his debts due to the Bank, and could absolutely sell and dispose of the shares standing in the name of any such debtor and apply the proceeds thereof in discharge of such debts, and could without any further consent of share-holder, transfer the shares in the books of the Bank to a purchaser. The Bank sued to recover a debt from one of the share-holders, obtained a decree and in execution, the shares of the debtor were put to sell expressly stating that they would be sold free of incumbrance and purchased the same. There was no reduction of capital under S. 55 (1), Companies Act, and the Bank finding that mistake was made in purchasing the shares allowed the shares to remain in debtor's name and subsequently sold the shares to some directors to satisfy the debt when the decree had become time barred. In a suit by the debtor's heir for a declaration that the sales were nullity:

*Held* that the Bank's conduct amounted to clear waiver of the lien upon which it could not afterwards rely. 1 Camp. 410 and (1859) 14 E. R. (C. P.) 499, *Ref.* [Para 8]

*Held further*, that the rights upon the debt which formed the foundation of the lien, ceased to exist once the decree was obtained and became rights under the decree which could be enforced only by execution, and once execution became barred there remained no other means of enforcing them: 12 A. I. R. 1925 All. 6 and 5 A. I. R. 1918 P. C. 34, *Ref.*; 34 A.I.R. 1947 Pat. 40, *REVERSED.* [Para 10]

(b) Letters Patent (Pat.), Cl. 10—Point involving questions of fact cannot be raised for first time in Letters Patent appeal.

A point which was not agitated in the lower Courts and which involves questions of fact cannot be permitted to be raised for the first time in Letters Patent appeal. [Para 12]

Annotation.—('44-Com.) C. P. C. L. P. Cl. 15, N. 14.

*Cases referred:*—
1. 1 Campbell 410.
2. (1859) 141 E. R. (C. P.) 499 : 6 C. P. (N. S.) 366.
3. ('25) 12 A. I. R. 1925 All. 6 : 83 I. C. 1033.
4. ('18) 45 I. A. 130 : 5 A. I. R. 1918 P. C. 34 : 40 All. 407 : 45 I. C. 798 (P.C.).

*G. C. Mukherjee*—for Appellant.
*B. C. De*—for Respondents.

**Meredith J.** — This is a plaintiff's appeal under the Letters Patent from a decision of Shearer, J. sitting singly, and it arises out of a suit asking for a declaration that a sale of certain shares of the Chotanagpur Banking Association was a nullity, and asking that the names of the purchasers of the shares should be deleted from the register of share-holders and the plaintiff's name should be substituted.

[2] The circumstances were that one Digendra Nath Mukherji, the plaintiff's uncle, held 48 fully paid shares of the Chotanagpur Banking Association (defendant 1). On 20th July 1915, Digendra borrowed a sum of Rs. 1500 from the Bank upon a handnote. On 15th May 1923, the Bank obtained a decree upon the handnote against Digendra's heirs. In execution thereof on 3rd August 1935, the shares were sold through the Court and purchased by the Bank itself as decree-holder. The Companies Act of 1913 was then applicable, and under S. 55 (i) of that Act, "no company limited by shares shall have power to buy its own shares unless the consequent reduction of capital is effected and sanctioned in manner hereinafter provided." There was no reduction of capital, and apparently the Bank soon realised that a mistake had been made, and the shares were allowed to stand in the name of Digendra, while on 31st December 1935 the secretary of the Bank transferred 43 of the shares to certain Directors and their wives, the other defendants, in order to satisfy Digendra's debt.

[3] The plaintiff eventually became Digendra's sole heir and applied for a succession certificate. For this purpose he applied for duplicates of the share certificates, and the Bank then informed him that 43 of the shares had been sold to others.

[4] Then followed the present suit, the plaintiff contending that the original sale was a nullity and so also the second sale in 1935 as the Bank had no power to sell Digendra's shares.

[5] The Munsif decreed the suit, and the Subordinate Judge in first appeal upheld that decision. Shearer, J. in second appeal, however, reversed the decision and dismissed the suit. He agreed with the Courts below that the purchase of its own shares by the Bank was a nullity, and that is not now disputed. He pointed out, however, that under Art. 30 of the Articles of Association of the Bank, to which the share-holder must be taken to have agreed when he purchased the shares, the company had a paramount or prior lien on the shares of each member for all his debts and could absolutely sell and dispose of the shares registered in the books of the company in the name of any such debtor and apply the proceeds so far as the same would extend in discharge and satisfaction of such debts, and without any further or other consent of the holder of the shares could transfer the same in the books of the company to a purchaser. He considered in view of this that the sale by the Secretary of the Bank, though possibly subject to certain irregularities with regard to notice and so on, was a good sale, and the plaintiff as Digendra's heir consequently had no title to the 43 shares.

[6] Mr. Ganga Charan Mukherji for the appellant has urged a number of points which I shall deal with seriatim.

[7] Mr. Mukherji's first contention is that there is a definite finding by both the Courts of fact that the sale by the Bank's Secretary did not purport to be in exercise of the right under Art. 30, and it cannot, therefore, be called a sale in virtue of the lien, and it was not open to Shearer J. to say that in selling the shares on 31st December 1935 the Bank purported to be exercising the right conferred on it by Art. 30 of its Articles of Association. This argument does not appeal to me because even if the sale was not expressly made under the powers conferred by Art. 30, nevertheless the sale by the Bank must be attributed to those powers, and as long as the powers existed the sale would be a good sale. It is difficult to see how the Bank could have contemplated such a sale except under Art. 30, because the mistake in making the purchase had undoubtedly been realised, and it was known that the purcahse was nothing, and the shares still remained the property of Digendra's heirs. The real question is not whether the sale was expressly made under the lien, but whether, when the sale took place, the power to sell was there or not.

[8] Mr. Mukherji's second contention has much more force. He argues that when the Bank went to Court and took a decree on the handnote and sold the shares in execution without any mention of the lien or attempt to rely upon it, the lien must be taken to have been abandoned. I consider this is correct. It was not merely that the Bank sued for recovery of the loan without any mention of or attempt to enforce the lien, but it even expressly purported to sell the shares free of encumbrance. Exhibit 3A is a petition filed by the decree-holder on 18th April 1935 stating that there was no encumbrance on the shares. Mr. B. C. De for the respondents says this merely means that the Bank meant that the

encumbrance would be put an end to upon the purchase by satisfaction of the debt; but the statement that the sale was without encumbrance was irrespective of whether the purchase price fully satisfied the debt or not, and in fact the execution case was dismissed only on part satisfaction. In acting as it did, the Bank definitely held out to prospective purchasers that should any portion of the debt remained unsatisfied no attempt would be made to rely upon any lien upon these shares for satisfaction of the balance. In Halsbury's Laws of England, Edn. 2, Vol. 20, p. 584, Art. 738, we find it stated that a lien is waived or destroyed *inter alia* where a party claims to retain goods on grounds different from those on which he rests his claim for lien, and makes no mention of the lien. A number of cases are referred to of which I may mention *Boardman* v. *Sill* (1 Camp. 410.)[1] This was an action of trover for some brandy which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time, certain warehouse rent was due to the defendant on account of the brandy of which no tender had been made to him. The Attorney General contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But Lord Ellenborough considered that as the brandy had been detained on a different ground and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one. This doctrine was affirmed in *Weeks* v. *Henry Gooda* (141 E. R. (C. P.) 499=6 C. B. (N. S.) 366.)[2] In my opinion the Bank's conduct in the present case amounted to a clear waiver of the lien, upon which accordingly it could not afterwards rely.

[9] Mr. Mukherji's next contention, in my opinion, also succeeds. He points out that whereas the handnote was executed in July 1915 the sale relied upon did not take place until December 1935. Consequently not only had the debt become time-barred but further execution of the decree was also time-barred under S. 48, Civil P. C. Shearer J. dealt with this by pointing out that limitation merely puts an end to the remedy, but does not extinguish the right. Despite the bar of limitation, the debt continued to exist, and as long as it existed the lien subsisted and the Bank could sell in exercise of the lien. Mr. Mukherji's answer is that all rights upon the handnote had been merged in rights under the decree. After the decree the decree-holder had no other rights than those under the decree, and consequently such rights as he had could only be exercised upon the decree, that is, by execution, and once execution became barred there remained no rights which could be enforced in any other way. The lien ceased with the right, for there could be no lien once there were no longer any rights upon which it could be founded. Reliance is placed upon *Abdul Rahim Khan* v. *Rambharos Ojha* (A. I. R. 1925 ALL. 6.)[3] In that case it was held that after a decree upon a mortgage, the mortgage security had merged in the decree, and whatever rights the mortgagee afterwards possessed were the rights which he acquired under the decree. If owing to her own default she allowed her remedy under the decree to be barred by time she had no longer any other rights to which effect could be given. Reliance was placed upon the Privy Council case in *Het Hem* v. *Shadi Lal* (45 I. A. 130)[4] wherein their Lordships had pointed out that when a mortgagee obtained a decree, that decree was a substitute for his rights under the mortgage and when the right to execute the decree became barred by time the decree ceased to be operative.

[10] In the same way it seems to me that in the present case the right upon the handnote, which formed the foundation of the lien, ceased to exist once the decree was obtained; and became rights under the decree which could be enforced only by execution, and once execution became barred there remained no other means of enforcing them.

[11] On both these points the appeal must, in my opinion, succeed, and it consequently becomes unnecessary to consider Mr. Mukherji's remaining two points, namely, that the decree must be regarded as satisfied by the sale unless and until the sale be set aside or judicially declared a nullity. This had not been done in 1935, and consequently the Bank had no right or lien to enforce it. Secondly, that a lien of this type, which he characterised as an active lien which can be used for attack by sale as well as in defence, can only be exercised within the period of limitation.

[12] The defendants other than the Bank have appeared separately before us and argued that as *bona fide* purchaser for value, if the sales to them be set aside, they are entitled to compensation from the plaintiff or from the Bank under Section 65, Contract Act and under Sch. 1, Table A, Regn. 11, Companies Act. No such questions, however, appear to have been agitated before the Courts below. Questions of fact are involved, whether the sales were *bona fide*, whether consideration was paid, and so on, and such a point cannot be permitted to be raised for the first time in Letters Patent appeal. These defendants must seek their remedy, if any elsewhere.

[13] I would allow this appeal, set aside the

decision of Shearer J. and restore that of the learned Munsif with costs throughout.

**Agarwala Ag. C. J.** — I agree.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 446** *[C. N. 158.]*

MANOHAR LALL AND MEREDITH JJ.

*Jangal Singh and others* — *Appellants* v. *Mukund Kumar and others*—*Respondents.*

Letters Patent Appeal No. 21 of 1943, Decided on 9-4-1948, from judgment of Rowland J., D/- 18-3-1943.

(a) T. P. Act (1882), S. 110—Agricultural lease—Time of commencement of lease not specified — Lease becomes operative on day it was made — False recital of receipt of premium in lease deed cannot lead to inference that commencement was postponed.

Where an agricultural registered lease deed recited that having taken Rs. 300 (salami), the lessor settled the land with the lessee in permanent *raiyati* right :

*Held*, on a consideration of the general principles underlying Ch. V, T. P. Act, that the lease became operative on the date it was made and when the lessee accepted the terms of the lease. The mere fact that salami had not been paid could not lead to the legal inference that the lease was not made on that date. In the case of a lease some much clearer and more definite indication of intention to postpone commencement would be necessary than a mere incorrect recital of receipt of salami : 28 A. I. R. 1941 Pat. 577; 15 A. I. R. 1928 Cal. 392 and 6 A. I. R. 1919 Cal. 837, *Ref.* [Paras 9, 15]

Annotation. — ('45 Com.) T. P. Act, S. 110, N. 1, pt. 6.

(b) T. P. Act (1882), Ss. 107 and 117—Agricultural lease by registered instrument—Delivery of possession is not necessary for validity.

A valid lease of agricultural land can be made by a registered instrument and delivery of possession is not necessary in such a case : 28 A. I. R. 1941 Pat. 577, *Ref.* [Para 10]

Annotation.—('45-Com.) T. P. Act, S. 117, N. 4.

(c) Evidence Act (1872), Ss. 101, 103 — Landlord and tenant — Registered sale deed — Recital that consideration was received — Onus to prove that recital is incorrect is on lessor and not lessee.

In a suit by a lessee against the lessor based on a registered sale deed, it is not for the lessee to prove payment of consideration but for the lessor to prove the incorrectness of the recital in the document that the consideration had been received. [Para 11]

Annotation.—('46 Man.) Evidence Act, Ss. 101 and 103 N. 37.

*Cases referred*:—

1. ('41) 20 Pat. 346 : 28 A. I. R. 1941 Pat. 577 : 192 I. C. 451.
2. ('28) 55 Cal. 435 : 15 A. I. R. 1928 Cal. 392 : 110 I. C. 368.
3. ('19) 23 C. W. N. 190 : 6 A. I. R. 1919 Cal. 837 : 50 I. C. 177.

*S. C. Ghosh*—for Appellants.

*S. C. Mazumdar*—for Respondents.

**Meredith J.** — This is a defendants' appeal under the Letters Patent from a decision of Rowland J., setting aside the decision of the Subordinate Judge in first appeal and restoring that of the Munsif decreeing the suit.

[2] The suit was for declaration of title and recovery of possession by ejecting defendants 1 to 3 (first party) the plaintiffs' case being that on 29-6-1937, they had taken a settlement of the land under a registered lease (*patta*) from the landlord, the pro forma defendant 4, upon a rental of Rs. 3 and a *salami* of Rs. 300. They obtained possession under this lease. The landlord, however, on 9-12-1937, executed three deeds of lease in favour of defendants 1 to 3. After this the latter forcibly ejected the plaintiffs, and a subsequent criminal case ended in the defendants' favour.

[3] Only the principal defendants 1 to 3 contested the suit, and the defence was that the plaintiffs had never paid the *salami*, and for that reason the lease was cancelled. The document had never been made over to the plaintiffs, and the latter had never got possession.

[4] The learned Munsif held that the plaintiffs had failed to prove payment of the *salami*, but their interest in the land accrued upon registration of the *patta*, and accordingly they were entitled to succeed. The argument addressed to him by the defendants that title was to pass only upon receipt of the premium carried no weight with him, because such an intention of the parties had been neither pleaded nor proved. He believed the plaintiffs' story of possession, and dispossession and he decreed the suit against the principal defendants with costs.

[5] Only these principal defendants appealed. The learned Subordinate Judge said that the finding that the *salami* had not been paid had become final because the plaintiffs had not filed any cross-objection. Here he was wrong, as Rowland J., has pointed out, and he ought to have come to an independent finding. He proceeded also to reject the plaintiffs' story of possession and dispossession, but mainly because of the non-payment of the premium. He said:

"When they did not pay the consideration or take the *patta* it cannot be reasonably believed that they (the plaintiffs) were allowed to take possession by defendant 4."

He further held that the *patta* showed that passing of title and receipt of consideration were intended to be simultaneous, and that as consideration had not been received title had not passed. In this view he dismissed the suit.

[6] Rowland J., observed that the view of the learned Subordinate Judge was based upon certain rulings with regard to sale deeds and the same considerations did not necessarily apply to leases. Though the lease was an agricultural one, and, consequently, Chap. V, T. P. Act, was not directly applicable, yet the provisions of that chapter could be referred to in so far as the law merely codified principles of general application to leases, and there was the authority

of *Mohammad Hanif* v. *Khairat Ali*, 20 Pat. 346,[1] for the proposition that certain provisions in S. 107, T. P. Act, 1882, represented the prevailing law with regard to agricultural lease also (though not, be it noted, the provision in that section that a lease of immovable property made by a registered instrument must be executed by both the lessor and the lessee otherwise the lease would have been invalid as it was not executed by the lessee and there was no *kabuliat*). He pointed out that under S. 110, T. P. Act, where no date of commencement is named in the lease, time begins to run from the making of the lease, and he thought that was applicable to leases generally. His opinion was that in construing a lease it must be held that it comes into force on the date when it is made unless there is some express provision to the contrary in the lease itself. Here there was none. The lease merely recited that having taken Rs. 300 the lessor settled the land with the lessee in permanent *raiyati* right. He said, had his view of the law been otherwise a remand would have been necessary for findings with regard to the payment of the premium and the question of possession and dispossession.

[7] In appeal a preliminary point was taken that defendant 4, Govind Singh, died on 13-2-1943, before Rowland J.'s order of 18-3-1943, allowing the appeal. No steps had been taken for substitution, and the decree was, therefore, a nullity being against a dead person.

[8] There is nothing in this point. The suit was never decreed against defendant 4 even by the Munsif, and there was never any appeal by defendant 4. He was not a necessary party, and there is no defect in the decree.

[9] Next we were pressed with the contention that Rowland J.'s views with regard to the law applicable to leases were wrong, and the same principle should be applied as in the case of sales. I am of opinion, however, that Rowland J. was right. I have read the *patta*, and it is unquestionably a present demise, and will operate as such from the date of registration. There is nothing in the document whatever to suggest that the commencement of the lease was to be postponed. I think in the case of a lease some much clearer and more definite indication of intention to postpone commencement would be necessary than a mere incorrect recital of receipt of *salami* when in fact *salami* might not have been received.

[10] It has further been argued that this was a mere agreement to lease, and that it could only become a completed lease by delivery of possession. Reliance for this is placed on the case already referred to, *Muhammad Hanif* v. *Khairat Ali* 20 Pat. 346,[1] but that decision deals only with oral leases. There is no authority whatever for the proposition that a valid lease of agricultural land cannot be made by a registered instrument in the absence of delivery of possession. On the contrary, the provision in S. 107, T. P. Act, relied upon in that case by Fazl Ali J. itself says

"all other leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession."

If this represents the law in relation to leases generally, as Fazl Ali J. suggested, it follows that no delivery of possession is necessary in the case of a lease by a registered instrument. The argument that the document represents not a lease but an agreement to lease appears to me quite without substance. In terms it is a present demise, not an agreement subsequently to execute one.

[11] My view of the law is the same as that of Rowland J. See *Dinanath* v. *Janki Nath Ray*, 55 Cal. 435[2] and *Kailash Chandra Bhomik* v. *Bijoy Kanta* 23 C. W. N. 190.[3] Had it been otherwise, I agree with his view that a remand would have been necessary, not only because the Subordinate Judge has not come to an independent finding that the premium was not paid, but because even the Munsif's finding on that point was based upon a misplacement of the onus. The finding was merely that the plaintiffs had failed to prove payment of consideration. It was not for them to do so, but for the defendants deriving title from defendant 4 to prove the incorrectness of the recital in the document that consideration had been received. It was a very heavy onus in view of the fact that the lessor himself did not come forward to say that he had not received consideration. I think it was most certainly for the contesting defendants, if they wished to contradict a statement in the lease that the money had been received, to examine the lessor defendant 4 to deny it and, not having done so, their statement of non-payment was not worthy of serious consideration.

[12] I would dismiss this appeal with costs.

[13] **Manohar Lall J.** — I agree. The case in 20 Pat. 346[1] is an authority for the proposition that the provisions of Chap. 5, T. P. Act, although not directly applicable to agricultural leases, can be utilised to find out the general principle which govern the rights of the lessor and the lessee, unless there is a specific law or usage to the contrary regarding agricultural leases. For instance, an agricultural lease can be made orally accompanied by delivery of possession or by registered instrument which need not be executed both by the lessor and the lessee.

[14] The question in the present case is whether the lease in dispute was effective although

the salami had not been paid. By S. 105, T. P. Act, a lease confers a right on the lessee to enjoy the property when he accepts the transfer on the particular terms of that lease. Section 110 provides that the day of commencement of the lease unless otherwise named in the document is the day of the making of the lease. Section 108, sub-cl. (b) provides that, if the lessee requests the lessor, the lessor is bound to put him in possession of the property, and sub-cl. (c) provides that the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. It will be noticed that it does not state that if the latter pays the premium where the consideration for the lease is both the premium and the rent reserved, then only he can hold the property.

[15] On a consideration of these general principles, I am of the opinion that the lease in the present case became operative on the date it was made and when the lessee accepted the terms of the lease. The mere fact that the salami had not been paid cannot lead to the legal inference that the lease was not made on that date. I agree with my learned brother that ordinarily the terms of the contract must indicate clearly whether the making of the lease was postponed till after the payment of the premium. The false recital in the document about the receipt of the premium has no bearing whatsoever upon the question which we have to decide.

[16] I am not considering the case law which bears upon the question of passing of title from the vendor to the vendee on the mere registration of the document, because the relationship between the vendor and the vendee ceases after the title has passed, but in the case of a lease the relationship starts from the making of the lease and continues till the end of the term of the lease. It is, therefore, not quite correct or safe to apply the principle of cases dealing with the passing of the title in the case of a sale to the case of a lease. It was open to the parties to contract that unless the premium is paid the lease will not become effective; in that case, the lease would have begun from the future date, namely, the date of the payment of the premium.

[17] For these additional reasons, I agree that the appeal should be dismissed with costs.

V.B.B. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 448** *[C. N. 159.]*

MANOHAR LALL AND MUKHARJI JJ.

*Midnapur Zamindari Co. Ltd.*—**Appellant**

v. *Maneck Homi and others*—*Respondents.*

A. F. O. D. No. 205 of 1944, Decided on 23-12-1947, from decision of Sub-Judge, Purulia, D/- 14-1-1943.

**(a) Land tenures—Subsoil rights—Raj Barabhum—Taraf Satrakhani — Taraf Sardar held, was not shikmi proprietor of ghatwali or non-ghatwali villages of Taraf—As between Zamindar of Barabhum and Taraf Sardar title to underground minerals and sub-soil rights held, was with Zamindar and thereafter went to plaintiff.**

*Held*, on evidence, (i) that the Taraf Sardar of Taraf Satrakhani of Raj Barabhum, was not a Shikmi proprietor of the ghatwali or the non-ghatwali villages in suit appertaining to Taraf Satrakhani;

(ii) that as between the Zamindar with whom the Permanent Settlement of Raj Barabhum was made in 1793 and the Taraf Sardar, the title to the underground minerals and sub-soil rights was with the Raja and, therefore, with his transferee Kenny and thereafter it went to the plaintiff;

(iii) that neither the compromise of 1894 nor the execution of the lease to Whyte and Cohen, nor the mukarrari lease of 1894 by Robert Watson & Co. in favour of the Taraf Sardar nor the darmukarrari settlement of the same year by the Taraf Sardar with Robert Watson & Co., affected the title of the plaintiff either in fact or in law or by reason of the doctrines of estoppel and acquiescence; [Para 35]

(iv) that since the Taraf Sardar had no claim to underground rights in the villages in suit as against the plaintiff, the defendants who were lessees from the Taraf Sardar had also no such right. [Paras 37, 44]

**(b) Landlord and tenant — Nature of tenancy—Proof of — Views of public officers cannot form basis of judicial decision.**

Opinions expressed by public officers in their reports as to the nature of a tenure and the rights of a tenure-holder, although they are certainly entitled to weight, cannot form the basis of a judicial decision: 11 A. I. R. 1924 Pat. 616 and 22 A. I. R. 1935 Pat. 33, *Ref.* [Para 14]

*Cases referred:*—

1. ('24) 3 Pat. 673 : 11 A. I. R. 1924 Pat. 616 : 84 I. C. 405, Mathewson v. Secretary of State.
2. ('34) 13 Pat. 517 : 22 A. I. R. 1935 Pat. 33 : 156 I. C. 136, Muktakeshi Patrani v. Midnapore Zamindary Co. Ltd.
3. ('31) 58 I. A. 125 : 18 A. I. R. 1931 P. C. 89 : 58 Cal. 1187: 131 I. C. 753 (P. C.), Govind Narayan Singh v. Sham Lal Singh.
4. ('12) 39 Cal. 696 : 39 I. A. 133 : 15 I. C. 219 (P. C.), Durga Prasad Singh v. Brojo Nath Bose.
5. ('10) 37 Cal. 723 : 37 I. A. 136 : 6 I. C. 785 (P. C.), Hari Narayan Singh Deo v. Sriram Chakravarti.
6. ('26) 5 Pat. 80 : 13 A. I. R. 1926 Pat. 130 : 91 I. C. 169, Midnapur Zamindari Co. Ltd. v. Ram Kanai Singh Deo.
7. ('74) 12 Beng. L. R. 423, De Souza v. Secretary of State.
8. ('15) 37 All. 557 : 2 A. I. R. 1915 P. C. 96 : 42 I. A. 202 : 30 I. C. 299 (P. C.), Bilas Kunwar v. Desraj Ranjit Singh.
9. ('31) 58 I. A. 29 : 18 A. I. R. 1931 P. C. 186 : 10 Pat. 407: 130 I. C. 315 (P. C.), Nageshwar Baksh Roy v. Bengal Coal Co.
10. ('14) 20 C. L. J. 527 : 2 A. I. R. 1915 Cal. 250 : 27 I. C. 471, F. E. Christian v. Narbada Keori.

11. (1840) 48 E. R. 1262, Viner v. Vaughan.
12. ('41) 22 P. L. T. 1009 : 28 A. I. R 1941 Pat. 13 : 20 Pat. 96 : 193 I. C. 760, Kusum Kamini Debya v. Jagdish Chandra Deo.
13. ('42) 23 P. L. T. 662 : 30 A. I. R. 1943 Pat. 31 : 203 I. C. 442, Purnendu Narayan v. Narendra Nath.

*S. C. Masumdar, Ramanugrah N. Singh and S. K. Masumdar*—for Appellant.

*R. S. Chatterji and N. N. Roy*—for Respondents.

**Manohar Lall J.** — In this appeal by the plaintiff the principal question for decision is whether the appellant has title to the subsoil or mineral rights in the lands of village Mango and part of village Pardih lying within the ambit of Pergana Barabhum.

[2] The plaintiff is the Midnapore Zamindary Co. Ltd. who claim title to the subsoil rights as the patnidar and permanent lessee of Taraf Satrakhani and others Tarafs in Pergana Barabhum under the zamindar Raja by various transfers from about 1885 onwards that will have to be noticed in detail hereafter—the villages in suit are admittedly situated in the ambit of Taraf Satrakhani.

[3] On 7-1-1941, the plaintiff-appellant instituted a suit, T. S. No. 3 of 1941, in the Court of the Subordinate Judge of Purulia upon the allegation that Radha Govind Singh, who was a tenure-holder under the plaintiff, without any right to the subsoil and minerals in the properties in that suit, was allowing his servants, agents and employees to carry away stone, ballast, boulders, morrum and sand by digging, quarrying, ballasting etc. and trying to realise royalties. Accordingly, the plaintiff asked for a decree that the rights of the plaintiff be declared to the mines, minerals and subsoil in the properties in suit and a decree may be passed for a permanent injunction restraining the defendant, his servants and agents from interfering with the rights of the plaintiff company to those minerals and subsoil rights. It was also prayed that the defendant may be asked to furnish an account of all the royalties realised by him in respect of the minerals.

[4] Radha Gobind Singh in his written statement denied inter alia that the plaintiff had any rights whatsoever to the minerals and in the course of the trial further contended that his position was not that of a tenure-holder under the company but of an independent proprietor coeval with the zamindar of Barabhum from whom the company claimed title. He also pleaded that the suit of the plaintiff was barred by limitation, estoppel and acquiescence.

[5] On 20-3-1941, the plaintiff company filed another suit, Title Suit No. 109 of 1941, in the Court of the same Subordinate Judge against Maneck Homi and Khurshed Maneckji Bharucha in which, after reciting the above facts upon which the plaintiff based his title, it was alleged that these two defendants were claiming to hold the property in dispute under an indenture dated 25-9-1919, executed in their favour by Radhagobind Singh and were threatening to interfere with the works of the contractors of the plaintiff and forcibly with the help of their creatures and latbials were threatening to stop the work of the plaintiff. Accordingly, the plaintiff prayed for a declaration that these two defendants had no right whatsoever to the minerals and subsoil rights in the property in suit and for a permanent injunction restraining them, their servants and contractors from interfering with the works of the plaintiff and his licensees.

[6] In the written statement these two defendants took a similar plea as was taken by their lessor Radhagovind Singh. They pleaded that Radhagovind was a necessary party to the suit. They further alleged that the plaintiff had no title to maintain the suit which was barred by limitation.

[7] These two suits were tried together by consent of the parties and were disposed of by one judgment dated 14-1-1943, by Mr. Upendra Narayan Singh, the learned Subordinate Judge of Purulia, who has written an able and exhaustive judgment. The learned Subordinate Judge held that neither the zamindar of Barabhum nor the plaintiff had any title to the minerals or to the subsoil rights in the villages in both the suits and that the entire Taraf known as Taraf Satrakhani was held by the ancestors of Radhagovind Singh from time immemorial not by virtue of any grant from the Raja of Barabhum but by virtue of their own independent rights of a full proprietor and that they were not subordinate to but coeval with the Raja of Barabhum. He also held that the plaintiff was precluded from claiming the rights by reason of estoppel and acquiescence. Lastly, he held that the two suits of the plaintiff were barred by limitation because he was satisfied on the evidence that the possession of the defendants and their ancestors was adequate in continuity, publicity and extent so as to entitle them to claim right by adverse possession. Accordingly, the two suits were dismissed.

[8] From these decisions and decrees two appeals were preferred by the plaintiff, one to this Court and the other to the Court of the District Judge and this has been transferred to this Court. In First Appeal No. 32 of 1943 filed directly to this Court—Radha Gobind Singh was the respondent and in First Appeal No. 205 of 1944 which was transferred to this Court — Maneck Homi and Khurshed Maneckji Bharucha are the two respondents.

[9] First Appeal No. 32 of 1943 was disposed of as a result of a compromise by a petition dated 5-9-1946, between the plaintiff and Radha Govind

Singh. One of the terms of the compromise was that on payment of a salami of Rs. 10,000 the plaintiff company will grant a permanent lease of the underground rights with respect to a number of villages including the villages in the suit against Homi and Bharucha to Radha Gobind Singh and that a regular lease will be registered containing the agreed terms—a draft of the proposed lease was also attached to the compromise petition. It was also stated in that compromise petition that the appeal against Maneck Homi and Khurshed Maneckji Bharucha will proceed and that the compromise was irrespective of the result of that appeal. In pursuance of that compromise we are informed a lease has since been registered.

[10] First Appeal No. 205 of 1944 was taken up for hearing on 22-4-1947. On that date learned advocate for Maneck Homi raised the objection that as a result of the compromise decree passed by this Court in First Appeal No. 32 of 1943 and of the execution and registration of a lease by the plaintiff in favour of Radhagobind Singh, the plaintiff was no longer entitled to any relief and the decree of the lower Court should be affirmed irrespective of the correctness or otherwise of the findings of the Subordinate Judge. After hearing the parties we were satisfied that this objection was not well-founded (*see* our order dated 22-4-1947). We thought it desirable, however, that Radhagovind Singh should be made a party in this appeal. Accordingly he has been made a party and we have now heard learned advocates for the plaintiff-appellant, for the respondent Maneck Homi —respondent Khurshed Maneckji Bharucha has not appeared — and the learned advocate for Radha Gobind Singh who supports the appellant. Mr. S. C. Mazumdar on behalf of the appellant has presented a careful argument and we are indebted to Mr. R. S. Chatterji for a very able and interesting argument.

[11] *Rights of Raj in Taraf Satrakhani* : The zamindari of the Raja of Barabhum includes four principal Tarafs including Taraf Satrakhani in which the villages in suit are situated. The question whether the Raja of Barabhum with whom the permanent settlement of pergana Barabhum was admittedly made in 1793 is the sole proprietor of Taraf Satrakhani and the other three Tarafs, or whether the Taraf Sardars are shikmi proprietors coeval with the Raja of Barabhum has been the subject of a most exhaustive and illuminating judgment by the late Sir Jwala Prasad in 3 Pat. 673.[1] The question again came up for consideration in 13 Pat 517[2] where Khwaja Mohammad Noor J., in a considerably shorter judgment has clearly set out the real position of the Taraf Sardars. It has been held in these two judgments that the claim of the Taraf Sardars was to be treated as independent proprietors coeval with the Raja of Barabhum was not correct and that they were subordinate tenure-holders under the Raja to whom they paid Panchak or quit-rents in addition to the performance of police duties for which they enjoyed the remaining portion of the villages in their respective Tarafs. These two judgments have discussed and considered the important materials that were relied on, viz., the oft-quoted judgment in the suit of 1872, the rafanama by which the dispute between the company, the predecessor of the plaintiff company and the Taraf Sardars was settled, the Ismnavisi of 1833 and the Report of Munshi Nandji of 1883, the notes and views of Col. Dalton, Strachy, Risley, Sifton and other public officers. Apart from some other evidence, these materials have again been placed before us in the record of these two suits. It has been pointed out in the judgments in 3 Pat. 673[1] (which concerned Taraf Panchardari) and in 13 Pat. 517[2] (which concerned Taraf Tinsaiya) that the comments and views of the public officers are entitled to weight but cannot form the basis of a judicial decision and that the origin of these Taraf Sardars and their relation with the Raj Barabhum are matters of ancient history and reliable data are not available to come to any definite conclusion but this can be safely concluded that at the time of the Permanent Settlement and ever since the Taraf Sardars were undoubtedly treated as subordinate tenure-holders, and that when in 1833 a dispute arose between the zamindar, the ghatwals and the sardars as to whether the latter held any mal land over and above the lands which they held as ghatwali tenures, they filed ismnavisi showing what lands are held as mal and what as ghatwali lands, and the dispute further accentuated in or about 1884 when the Raja of Barabhum granted the patni lease to Robert Watson & Company who threatened the Sardars and the Government with an expensive and protracted litigation. At that time the Taraf Sardars again appear to have claimed to be shikmi zamindars, but at the instance of the Government Mr. Risley brought about a compromise in 1884 in which the claim of the Taraf Sardars to be treated as shikmidars was disallowed. On an examination of this history the learned Judges in those two cases, as I have stated above, came to the clear conclusion that whatever the position of the Sardars may have been in the past, ever since the Permanent Settlement they have undoubtedly been nothing more than subordinate tenure-holders. The conclusions arrived at in those two judgments, however, are not binding upon Radha Gobind Singh, Maneck Homi and Khurshed Manekji Bharucha who were no

party to those suits, but the reasonings of the learned Judges are entitled to the highest weight and must be followed by me unless I am forced to different conclusions from the very materials which they examined and which have also been placed before us. Of course, if there are any materials other than those which the learned Judges examined, it will be the duty of this Court to come to an independent conclusion in deciding the title of the parties.

[12] To begin with, it must at once be stated that as between the plaintiff and the two respondents the right in the minerals must be originally presumed to be either with the Raja of Barabhum or with the ancestors of Radha Gobind Singh. This view is based on the Privy Council case in 58 I. A. 125[3] where it has been held that the subsoil rights in land forming part of a permanently settled zamindari are presumed at all events when they are not claimed by the Crown to belong to the zamindar and unless the grant expressly included the subsoil rights it would not convey them : *see also* 39 Cal. 696[4] — the case of a ghatwal of Manbhum which followed the decision of the Privy Council in 37 Cal. 723.[5] I am, therefore, unable to entertain the argument of Mr. Chatterji that the title to the minerals should be held to be with the Government. This is against the defence taken by these two defendants in the written statement and was not raised in the Court below.

[13] I now proceed to discuss the evidence which is to be found in the records of this case to show that the view taken by this Court in the two cases referred to above must be accepted as correct at least up to the year 1891.

[14] The judgment of Mr. Rowlett (Ex. 4) of the year 1872 clearly established that Taraf Satrakhani was a ghatwali tenure and that the Taraf Sardar of that date entirely failed to prove that he held it as a shikmi zamindari. The Report of Munshi Nandji (Ex. 29) of 1883 clearly takes the same view in paras 84 and 85 and the conclusion reached there was that it was conclusively established that Taraf Satrakhani was a ghatwali tenure and there was no land within its ambit in the possession of the Sardar Ghatwal which could be said to belong to him as a shikmi zamindar. The learned Subordinate Judge has relied upon para. 51 of the Report, but, in my opinion, he erred in treating the statement in this paragraph as the opinion of Munshi Nandji because the paragraph merely gives an extract from an earlier report of Babu Rai Charan Ghose, the Personal Assistant to the Commissioner of the Division, dated 25-3-1875. The rafanama or the deed of agreement between Manmohan Singh the father of Radha Gobind Singh and Robert Watson & Co. and the Government, known as the Ghatwali Rafanama—Ex. 11— also clearly recognizes this position in various paragraphs, e. g., paras. 10, 13 and 15. The opinion of Sifton in the Settlement Report of Barabhum, of Mr. Dent, the Joint Commissioner for the year 1832, of Col. Doulton and of Strachey show that they took the opposite view and these have been chiefly relied upon by the learned Subordinate Judge. But it is now well settled that these opinions, although they are certainly entitled to weight, cannot form the basis of a judicial decision. As a contrast, Risley and Nandjee took the opposite view. It may also be stated here that in the Survey record of rights (Ex. 26 series) Manmohan Singh is recorded as a mukarraridar under the Midnapore Zamindari Co., who was recorded as patnidar under the Raja of Barabhum. This entry in the record of rights has a statutory presumption of correctness attached to it. For these reasons I am saitsfied that it must be held that up to the year 1891 the evidence discloses that the ancestors of the parties, namely, the Raja and the Taraf Sardar of Satrakhani, accepted the position which was undoubtedly the correct position in law on the evidence that the Raja of Barabhum was the zamindar with whom the whole of the pergana, including Taraf Satrakhani, was permanently settled by the Government and that the Taraf Sardar was a subordinate tenure-holder under him.

[15] Has the position then been altered by reason of any subsequent event as may appear from the evidence which is to be found in this case ?

[16] On 9-2-1892, Manmohan Singh instituted a title suit for a declaration that the rafanama or the Ghatwali agreement of 1884 should be set aside as the Commissioner of the Chota Nagpur Division, who signed the agreement on behalf of Manmohan Singh whose estate was then under the operation of Act 6 [VI] of 1884, was not authorised in law or in fact to enter into this agreement which was alleged to have been entered into through foul and undue influence : *see* Ex. 7 (p. 42 of Part 3 of the paper-book.) In that plaint it was asserted in para. 1 that Taraf Satrakhani was the ancestral zamindari interest of the plaintiff for which he was liable to pay panchak jama of Rs. 873-10-0 annually to the Raja, but there is no specific allegation in the plaint that the Sardar was the shikmi proprietor or an independent proprietor of Taraf Satrakhani. In the written statement (Ex. 8) Robert Watson & Co. (who had obtained patni leases of pergana Barabhum from the Raja in 1885 and 1890) clearly stated in para. 7 that the plaintiff had no shikmi zamindari right in Taraf Satrakhani. The dispute between the parties was

settled by a compromise (Ex. 9) dated 18-8-1893. The first term of the compromise was :

"That out of Taraf Satrakhani appertaining to pergana Barabhum, the mouzas included in Sch. 1 below constitute ancestral ghatwali interest and the mouzas mentioned in Sch. 2 below constitute ancestral istimrari interest of the plaintiff and they are included in Taraf Satrakhani and Taraf Satrakhani constitutes patni taluq interest of us, the defendants."

The third term shows that in lieu of the deed of compromise of 1884 the rights of the parties will now be regularised by this compromise of 1893. By paras. 4 and 6, Manmohan Singh agreed to pay Rs. 240 for the ghatwali villages and Rs. 2100 for the non-ghatwali villages to the defendant company. The learned Subordinate Judge takes the view that by this compromise the defendant company recognized the claim of Sardar Ghatwal to be the independent proprietor of the villages within the ambit of Taraf Satrakhani. Before considering whether this view is correct it is necessary to find out what was the title of Robert Watson & Co. on the date of this suit.

[17] On 27-2-1883, the Raja of Barabhum made an ijara settlement with Robert Watson & Co. for a term of 21 years, 1290 to 1310 Fasli, at an annual jama of Rs. 20,000 which amount was reduced in the following year to Rs. 19,000; the ijara was for the entire zamindari and some portion of it was given in patni : *see* the recitals in Ex. 1 (p. 21) and Ex. 1 (a) (p. 30).

[18] On 8-3-1885, the Raja executed a permanent patni lease at an annual mukarrari jama of Rs. 4500 on receiving a salami of Rs. 30,000. It is recited in Ex. 1 (at p. 22) that the Raja had promised at the time of the ijara that if within the term of the ijara, Robert Watson & Co. desired to take patni settlement of the four Tarafs and the villages lying within the boundaries situated therein, that is to say, the ghatwali villages excepting the non-ghatwali villages, he will be prepared to grant a patni settlement and that it was in accordance with this promise that the Raja was making the patni settlement of the ghatwali villages only situated within all the four Tarafs together with the subsoil and mineral rights. Paragraph 14 of Ex. 1 excludes the non-ghatwali villages which are mentioned in para. 15.

[19] On 29-6-1890, by Ex. 1 (a), the Deputy Commissioner on behalf of the Raj, after reciting the ijara settlement of 1883 and the patni settlement of 8-3-1885, made a patni settlement of the non-ghatwali villages together with the subsoil rights in favour of Robert Watson & Co., on receiving a salami of Rs. 30,000 and at a permanently fixed patni jama of Rs. 3069-3-10 gandas.

[20] It appears, however, that the subsoil rights in the whole of the pargana had already been transferred by the Raja to Mr. N. Kenny by a mukarrari patta—Ex. 2 (a) dated 12-11-1881.

[21] It is, therefore, clear that on the date of the suit of 1892, Robert Watson & Co., did not possess the underground rights either in the ghatwali or in the non-ghatwali villages situated within the four Tarafs although the Raja purported to grant these by the two documents of 1885 and 1890.

[22] By the compromise of 18-8-1893, Manmohan Singh and Robert Watson & Co. settled their differences by stipulating that the previous rafanama of 6-3-1884 will be now superseded by the terms of this compromise (Ex. 9) and further in accordance with another term of this compromise a mokarrari patta and a mokarrari kabuliat were executed by Robert Watson & Co., in favour of Manmohan Singh and by the latter in favour of the company (Ex. C, p. 52 and Ex. 3, p. 60) dated 16-2-1894. The recitals in Ex. C, the mokarrari patta, are that Taraf Satrakhani is included in the patni taluk of Robert Watson & Co., and the non-ghatwali villages described in Sch. 1 are in the possession of Manmohan Singh. It also recites that with regard to the non-ghatwali villages a sum of Rs. 2100 will be paid by Manmohan Singh and his successors perpetually to the company and that an annual panchak of Rs. 240 will be paid by Manmohan Singh and his successors with regard to the Ghatwali villages. It is also recited in the Mokarrari kabuliat that the company will possess and occupy the non-ghatwali villages mentioned in the schedule together with the dangas, hills etc.,—villages Mango and Pardih are specifically mentioned at pp. 61 and 63 in the schedule.

[23] Upon a consideration of the terms of the compromise of 1894 and the terms of the mokarrari patta and the mokarrari kabuliat of 16-2-1894, I am of the opinion that the parties did not specifically alter the position in law, that the Raja of Barabhum was the zamindar of the entire pergana Barabhum but established the position that the company would be in possession of the entire underground rights in the non-ghatwali villages and also in the ghatwali villages but the right of Manmohan Singh to be in possession of the ghatwali villages and the non-ghatwali villages was recognised.

[24] The title of Watson & Co. in pergana Barabhum was conveyed by Ex. 18 (c) on 15-4-1896, to Herbert Mathewson who conveyed the whole of his interest to the plaintiff on 25-6-1906, by Ex. 18 (d).

[25] It is well to recapitulate the position. The company, predecessor of the plaintiff, came to a settlement with regard to the underground rights in the villages, both ghatwali and the non-

ghatwali, in Taraf Satrakhani—the company was claiming to be entitled to the underground rights as a permanent lessee from the Raja and Manmohan Singh was claiming that right as an independent Shikmi proprietor. It may be stated here that I am not referring to the dispute which had been continuing for years past between the Raja and the Taraf Sardars as to the rights of the latter to remain in possession of the non-ghatwali villages over and above those which were found to be in their possession in the Ismnavisi of 1833—the number of such villages had increased since the time of the Permanent Settlement and I have seen it stated in several judgments of this Court that Robert Watson & Co. came on the scene as a powerful champion of the rights of the Raja to take possession from the Taraf Sardars of those villages of which they had been alleged to be in wrongful possession. It will be noticed that the compromise of 1894 could affect the rights of Kenny, who, as stated above, had obtained a transfer of the entire mineral rights from the Raja as far back as 1881.

[26] The rights of Kenny were transferred to the plaintiff in this way. On 24-2-1882, Kenny made a declaration of trust with respect to the underground rights in Raj Barabhum by Ex. 14. The schedule gives the names of all the cosharers who had acquired these underground rights. Kenny himself held a 3/32nd share. In 1891, the Barabhum Coal Co. was formed to acquire the rights of those cosharers—Ex. 16 is the Memorandum of Association dated 28-1-1891. On 5-2-1891, the cosharers including Kenny entered into an agreement for sale of their rights in the permanent mukarrari of 1881 in favour of Barabhum Coal Co. (Ex. 15). Kenny died between 1891 and 1905 leaving a will. One Foley on 2-12-1905, obtained letters of administration from the Calcutta High Court to the assets of Kenny including the assets specifically disposed of by the will and those with regard to which there was an intestacy. Under the powers granted by the letters of administration, Foley transferred the rights of all the cosharers including Kenny's rights in the mukarrari patta of 1881 in favour of Barabhum Coal Co.-Ex. 18. On 14-7-1916, Barabhum Coal Co. transferred their rights thus acquired in favour of Billinghurst—this document has not been printed in the paper book but the date has been supplied to us by the learned advocates appearing before us. Billinghurst finally transferred the rights which he acquired in 1916, to Midnapore Zamindary Co., the plaintiff, on 15-1-1917, by Ex. 18 (b).

[27] It will be seen, therefore, that the plaintiff acquired rights to the underground rights in the entire Raj Barabhum only in 1917.

[28] It is as well to dispose of here an argument of Mr. Chatterji that the plaintiff did not acquire any rights in 1917 as Foley had acquired no rights whatsoever under the letters of administration. His argument is that the rights of Kenny under the mukarrari patta of 1881 were not disposed of by the will and as there was an intestacy the letters of administration gave no rights in law to Foley. It is enough to refer to the case in 5 Pat. 80[6] where this argument was expressly considered and overruled by a Division Bench in the following words:

"Now it is quite true that Kenny did not deal with the demised property in his will and the learned Subordinate Judge is right in saying that 'so far as this property is concerned, he died intestate.' But even the estate of an intestate has to be administered in due course of law; and S. 179, Succession Act, says that the 'executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.' Now what is the meaning of the words 'all the property of the deceased'? There is high authority for the view that the words 'all the property of the deceased' must be construed as meaning the actual property of the deceased, whether held by him for his own benefit or for the benefit of others : *see* 12 Beng. L. R. 423.[7] There is no reason to doubt therefore that the demised property vested in Foley as such administrator under S. 179, Succession Act."

Das J. who delivered the judgment, then goes on to consider whether Foley was entitled to convey the property to the Barabhum Coal Co. and comes to the conclusion on a consideration of various sections of the Succession Act that the conveyance in favour of Barabhum Coal Co. was not liable to be attacked and therefore the plaintiff company had established his title to the demised property in consequence of the transaction between Barabhum Coal Co. to Billinghurst and from Billinghurst to Midnapore Zamindary Co. Ltd. I am bound by the decision of a Division Bench and in my view it was a correct decision. I must, therefore, overrule this contention.

[29] The learned Subordinate Judge thought that by the compromise of 1893, Robert Watson & Co. accepted the position that Taraf Satrakhani was an independent zamindari of Manmohan. As I construe the compromise, I do not accept that position. But, even if that position is accepted, it does not alter the situation because Robert Watson & Co. acquired the rights to the minerals by the transactions of 1894, several times referred to above, and certainly the plaintiff as the transferee of Kenny's interest acquired those rights only in 1917 and was not bound by the compromise between Manmohan Singh and Robert Watson & Co., because in that view Robert Watson & Co. had only the patni rights and not the subsoil rights even though the Raja purported to transfer the subsoil rights

also to Robert Watson & Co. in 1885 and 1890.

[30] But it is argued that there are some further transactions, both before and after the compromise of 1894, which alter the position. On 15-10-1890, Manmohan Singh made a permanent mukarrari settlement with A. Cohen of the underground mineral rights in Taraf Satrakhani in the non-ghatwali villages: *see* the kabuliat Ex. A(1) at p. 36, where stone quarries in village Pardih, one of the villages in suit, are expressly excluded. On 11-10-1893, Manmohan Singh made a temporary settlement with A. Whyte for 30 years, 1301 to 1330 Fasli of the underground rights in the ghatwali and non-ghatwali villages of Taraf Satrakhani subject to the rights of Cohen in the non-ghatwali villages: Exhibit A (2) p. 48. In this document the previous lease to Cohen is recited in this way:

"Prior to this, the settlement of subsoil right of the mauza of Taraf Satrakhani mentioned in schedule ka which you made with Mr. Cohen was in respect of minerals only, you did not settle the aforesaid limestone, etc."

In schedule ka to this document, villages Mango and Pardih are specifically mentioned (at pp. 50 and 51).

[31] On 20th February 1894, Manmohan Singh executed a darmokrrari patta having obtained a mukarrari patta from Robert Watson & Co., on 16th February 1894, as stated already, by which he settled some excess mal lands in Taraf Satrakhani with Robert Watson & Co., expressly excepting what was settled with Cohen and with Whyte in 1890 and 1893.

[32] It is argued on behalf of the respondents that the effect of these transactions just referred to was that the plaintiff is estopped from denying that Manmohan Singh had a right to the underground rights which he transferred to Cohen and Whyte and also by darmukarrari transaction with Robert Watson & Co., itself. In the first place, there is no evidence that Cohen and Whyte ever entered into possession of the underground rights which they obtained by the leases of 1890 and 1893, or even if they entered into possession that they remained in possession for any appreciable period. The leases in favour of Cohen and Whyte must, therefore, be ignored. The darmukarrari transaction in favour of Robert Watson & Co., did not relate to the lands of the villages in suit but expressly related to some excess villages which were outside those villages which were measured and demarcated as ghatwali both by Munshi Nandji and Mr. Risley—the villages in suit are not to be found in the schedule to the darmukarrari kabuliat. This transaction, therefore, is of no assistance to the defendants in the present case.

[33] But the most serious contention which the plaintiff has advanced is that Robert Watson & Co., are not the plaintiffs. As I have shown above, the plaintiff became entitled to the mineral rights in 1917 and the mineral rights were with Kenny and his co-sharers ever since 1881 and neither Kenny nor his co-sharers nor their successors were parties to these transactions.

[34] I do not understand how the learned Subordinate Judge has come to the conclusion that in view of the terms of these two documents the plaintiff is precluded from claiming the rights of (by?) estoppel and acquiescence.

[35] I, therefore, conclude as follows:

(1) The Taraf Sardar has not established on the evidence that he is a shikmi proprietor of the ghatwali or the non-ghatwali villages appertaining to Taraf Satrakhani.

(2) As between the zamindar with whom the Permanent Settlement of Raj Barabhum was made in 1793 and the Taraf Sardar, the title to the underground minerals and subsoil rights is with the Raja and, therefore, with his transferee Kenny and thereafter it has come to the plaintiff.

(3) Neither the compromise of 1894 nor the execution of the leases to Whyte and Cohen, nor the mukarrari lease of 1894 by Robert Watson & Co., in favour of Manmohan Singh nor the darmukarrari settlement of the same year by Manmohan Singh with Robert Watson & Co., affect the title of the plaintiff either in fact or in law or by reason of the doctrines of estoppel and acquiescence.

[36] The underground rights having thus been found to be with the plaintiff, have those rights been transferred to the defendants Homi and Bharucha?

[37] No document has been produced in this case to show that by any express words either the Raja or Kenny or the plaintiff transferred the underground rights to Manmohan Singh apart from the documents of 1894 which I have discussed above. The two defendants are in further difficulty because their title to the underground rights in the villages in suit is based upon the lease by Radhagobind Singh, dated 5th September 1919: Ex. 12 (e). A perusal of this lease would show that the underground rights have not been transferred expressly and clearly to Homi and Bharucha. These defendants, therefore, have no underground rights whatsoever in the village in suit.

[38] I have already shown that the lessor of these defendants, Radhagobind or his father Manmohan Singh, had no claim to the underground rights in these villages as against the plaintiff.

[39] One of the arguments accepted by the learned Subordinate Judge was that the lease of Kenny did not extend to the entire parganna Barabhum but only to some specified limit which was indicated in red in the map attached to the lease but as the map has not been produced it is impossible to find out what the area was.

[40] On behalf of the appellant it has been argued that the operative part of the document is:

"I settle in permanent mukarrari right with you the right of extracting and appropriating the underground minerals . . . . . lying within parganna Barabhum of my Raj specified in the schedule . . . . and appertaining to pargannas Bharabhum . . . . . all rights to the underground minerals lying within the entire parganna . . . . . "

It is argued that the words "lying within the boundaries shown in red line" towards the end of the western boundary (at p. 8) are redundant and cannot contradict the recitals in the operative part which I have quoted above. It is also argued that the certified copy of the mukarrari patta which has been filed in the case does not show that any map was attached to the document and that the defendants did not call upon the plaintiff to produce any map and, therefore, they are precluded from submitting that the map if produced would have destroyed the plaintiff's right and reliance was placed upon the Privy Council case in 37 ALL. 557.[8] The learned Subordinate Judge, on the other hand, accepted the defendants' argument that the description in the schedule should prevail over the recitals in the first part of the document.

[41] I am inclined to agree with the appellant's argument that it has not been established in this case that there was any map attached to the lease of Kenny. If the defendants had called upon the plaintiff to produce the map, the plaintiff would have shown why he was unable to produce the map. What I suspect, however, is that a portion in the map was to be made red in order to show the boundaries of parganna Barabhum and not to fix the boundaries of a part of the parganna. For instance, in the patni document of 1885 (Ex. 1) it is stated at p. 22:

"In the copy of the survey map of 1869 of the district of Manbhum forming part and parcel of the said Ijara patta, the portion covered by parganna Barabhum was shown in red and yellow colours."

But be that as it may, I am satisfied that on the materials as they exist it cannot be held that the plaintiff has withheld any map which was ever attached to the mukarrari document in favour of Kenny. The plaintiff filed the certified copy and it was equally possible for the defendants to have obtained a certified copy of the mukarrari patta with the map said to have been attached to it.

[42] The learned Subordinate Judge also observes that from the recitals of the sale-deed Ex. 18 executed by Foley, it would appear that the lease of Kenny was not in respect of the entire parganna Barabhum. I have read the recitals of Ex. 18 but I am unable to find anything to support the view of the learned Subordinate Judge. Perhaps the learned Subordinate Judge was thinking of the exception made regarding Taraf Dhadka stated in the body of the document and also in the schedule, but in the present case we are not concerned with Taraf Dhadka.

[43] The learned Subordinate Judge also took the view that S. 43, T. P. Act operates against the plaintiff by reason of the execution of Ex. 3 and Ex. C, namely, the patta and kabuliat of 1894. I have already shown that I do not see how the plaintiff who acquired the underground rights not as transferee of Robert Watson & Co., but as transferee of Kenny can at all be affected by the doctrine of acquiescence and estoppel.

[44] For these reasons, I must reverse the finding of the learned Subordinate Judge and hold that the title in the underground right was at all material times with Kenny from 1881 onwards and was with the plaintiff from 1917 onwards and that even as between Robert Watson & Co., and Manmohan Singh the rights to and possession of the minerals and other underground rights were with Robert Watson & Co., and thereafter with the plaintiff.

[45] The defendants not being entitled to any underground rights it is upon them to establish that the suit of the plaintiff was barred by limitation in that within the meaning of Art. 144, Limitation Act they have been openly and adversely possessing the entire subject-matter of these two suits against the plaintiff: *see* among other cases the Privy Council cases in 58 I. A. 29[9] and 58 I. A. 125.[3]

[46] The learned Subordinate Judge has recorded a finding that the disputed rights in the villages in suit were all along in possession of Radhagobind Singh or his ancestors from long long before 12 years of the institution of the present suit and the plaintiff had full knowledge of his use of the mineral rights. Is this conclusion correct?

[47] It is important to remember that in the present appeal we are concerned with only two villages—Mango and Pardih.

[48] The evidence of the defendants must now be examined. The two leases of Cohen and Whyte of the years 1890 and 1893 have already been dealt with by me and I have shown that there is no evidence on the record that these two

lessees remained in possession for any material length of time. On the other hand, there are indications in the evidence that Whyte did not work the underground rights which he got by the lease and, therefore, in 1900 the same villages were granted in lease to Gopal Chandra Mitra.

[49] Exhibit A(4) is a kabuliat executed by Gopal Chandra Mitra in favour of Manmohan Singh and is dated 6th March 1900. This was a settlement of a number of villages including the villages in suit for a period of 15 years—1307-1321 B. S. The learned Subordinate Judge has not referred to any evidence of actual working by Gopal Chandra Mitra so that it could be found out whether the working was openly hostile and continuous so as to attract the operation of the rule of adverse possession with regard to the mineral rights.

[50] Exhibit A(6) is a kabuliat executed by Prabash Chandra Mitra on 6th November 1910, but it is only with regard to stone quarry in Tago Hills situated in villages Padri and Mirzadih—it was admitted before us that the suit land in Pardih are not covered by this document.

[51] On 2nd February 1916, Radhagobind gave a lease of stone quarry in village Pardih to Nityanand Dutta for 1323 to 1333 B. S., Exhibit B. It is impossible to believe the oral evidence of defendants' witnesses 2, 3 and 4 that Nityanand worked out the stone quarry and took out stones from that to any substantial extent or for any considerable period. No account books or other papers of the time of Nityanand have been produced nor has any officer belonging to the business of Nityanand come forward to give evidence. The evidence moreover is extremely vague and does not even give the year of the working, far less for how many years the working was continued. (After discussing the evidence the judgment continued).

[52] This is all the evidence which has been adduced on behalf of the defendants. In my opinion, it is wholly insufficient to establish that Radhagobind was in adverse possession of the underground-minerals of the villages in suit. The learned Subordinate Judge appears to have applied Art. 142, Limitation Act, to the facts of this case, otherwise I cannot understand how on this evidence he could have come to the conclusion that the defendants have established a right by adverse possession over the mines of the villages in suit in favour of Radhagobind. The learned Subordinate Judge has shown that the evidence of actual working on behalf of the plaintiff is not very satisfactory and I agree with this conclusion, but the underground rights having been found with the plaintiff, his suit cannot be defeated because he is presumed to be in possession of the underground rights also unless the defendants establish by good evidence that the underground rights have ceased to be of the plaintiff on account of adverse possession by Radhagobind.

[53] I may now briefly examine whether the defendants Homi and Bharucha have been able to give any reliable evidence of adverse possession. It will be remembered that the lease in favour of these two defendants is dated 1919. The learned Subordinate Judge does not refer to any evidence which has been adduced on behalf of these two defendants to show that they have been openly working the mines in the villages in suit to entitle them to the benefit of the rule of adverse possession. I have been unable to discover any evidence, oral or documentary, in favour of the working of the mines by these defendants for any substantial period of time, far less for the requisite period and indeed no serious argument was advanced on behalf of these two defendants that they have acquired any right to these mines by adverse possession. This is not to be wondered at in view of the averments in para. 8 of the written statement. In that paragraph they did not give any indication as to the period for which the defendants have been allowing their contractors to take away stones, boulders, gravel etc., from the mines in question.

[54] For these reasons, I disagree with the finding of the learned Subordinate Judge that the suit of the plaintiff was barred by limitation.

[55] Mr. Chatterji, on behalf of the respondents, argued that, in any event, the suit should fail with regard to the hills and the mines which were open in 1894, the date of the patta and kabuliyat by Robert Watson in favour of Manmohan Singh and *vice versa*. This question loses all importance in view of my finding that the execution of the kabuliyat and the patta of 1894 could not in this case affect the rights of the plaintiff who was no party to this kabuliyat and patta and who derived the rights to the minerals as a transferee of Kenny's rights in 1917. As, however, the question is raised I propose to deal with it. In the first place, it is rightly contended on behalf of the appellant that this point was not raised in the Court below and there is no decision of the Subordinate Judge on this point. Moreover, when it has already been found that Radhagobind had no right in the minerals, he could not validly transfer those rights even in the open mines to Homi and further the lease in favour of Homi does not authorize him to work the mineral: *see* 20 C. L. J. 527[10] and (1840) 48 E. R. 1262.[11]

[56] With regard to the hills it is contended by Mr. Mazumdar that at the very highest Robert Watson & Co. conveyed only the rights

to enjoy the stones and not to remove the stones from the hills. This contention is borne out by a recent decision of this Court in 22 P. L. T. 1009[12] —see also 23 P. L. T. 662.[13]

[57] Mr. Chatterji in the last place contended that as Radhagobind has now been accepted to be the lessee with regard to the underground rights by the plaintiff by reason of the execution of a lease as a result of a compromise in this Court we should hold that Homi and Bharucha have now a right to work the mines in the villages in question. I do not agree with this contention because we are deciding the rights of the parties on the date of the suit and not with regard to a new situation which has arisen as a result of a compromise in this Court between Radhagobind and the plaintiff. It may be that as a result of the compromise the plaintiff will not be able to get any relief against Homi and Bharucha after the date of the lease and kabuliat executed in consequence of the compromise in this Court, but that question cannot be decided in the present appeal.

[58] The result is that the appeal of the plaintiff must be allowed. The decision of the learned Subordinate Judge is set aside and the plaintiff will be entitled to the following relief. The plaintiff has a right to the mines, minerals and sub-soil rights in Mauza Mango, Thana No. 135 and in the portions of Mauza Pardih, Thana No. 134, Survey Plots 525 and 540 and the eastern part of plot 527 as described in the schedule to the plaint and it will be declared that the defendants have no right to the same or to interfere with the working of the same by the plaintiff. A permanent injunction will be issued against the defendants restraining them, their men, servants from interfering with the plaintiff's possession direct or through their contractors of the minerals.

[59] The plaintiff will get costs of this Court and of the Court below from these two defendants.

**Mukharji J.**—I agree.

S.C. *Appeal allowed.*

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**A. I. R. (35) 1948 Patna 457** *[C. N. 160.]*

MANOHAR LALL AND RAY JJ.

*Mt. Kishori Kuer and others*—*Defendants*—*Appellants* v. *Parmeshwar Missir, Plaintiff and others, Defendants*—*Respondents.*

A. F. O. D. No. 391 of 1946, Decided on 16-2-1948, from decision of Addl. Sub-Judge, Arrah, D/-6-9-1946.

(a) Hindu Law — Religious Endowments—Shebait — Powers of — Suit by shebait of idol for recovery of temple properties — Suit is maintainable without joining idol as a co-plaintiff — C. P. C. (1908), O. 1, R. 10.

A right to sue for ejectment of a trespasser from the temple properties vests in the shebait of an idol and he can maintain a suit without mentioning the idol separately as a plaintiff along with him. It is sufficient if he brings the suit on behalf of and in the interests of the idol: 32 Cal. 129 (P.C.), *Rel on*; 12 A. I. R. 1925 P. C. 139, 20 A. I. R. 1933 P. C. 198 and 33 All. 735, *Ref.* [Para 9]

Annotation: ('44-Com.) C. P. C., O. 1, R. 10 N. 37.

(b) Hindu Law — Alienation — Widow — Persons entitled to challenge alienation are next reversioners — Strangers have no such right.

The persons entitled to impeach non-authorised alienations by a widow or other limited heir are obviously the next reversioners. Any person who has no interest in the succession is not entitled to impeach them. Such alienations are in their nature not absolutely void but voidable at the option of the reversioners who may affirm it or treat it as a nullity. This option, however, is confined to persons having interest in the reversion and is not exercisable by any outsider. [Para 12]

*Cases referred:*—

1. ('25) 52 I. A. 245 : 12 A. I. R. 1925 P. C. 139 : 52 Cal. 809: 87 I. C. 305 (P. C.), Pramatha Nath v. Pradyumna Kumar.
2. ('33) 60 I. A. 263 : 20 A. I. R. 1933 P. C. 198 : 8 Luck. 351 : 146 I. C. 1044 (P. C.), Kanhaiya Lal v. Hamid Ali.
3. ('04) 31 I. A. 203 : 32 Cal. 129 : 8 Sar. 698 (P. C.), Jagadindra Nath v. Hemanta Kumari Debi.
4. ('11) 33 All. 735 : 11 I. C. 47, Jodhi Rai v. Basdeo Prasad.
5. ('97) 19 All. 330, Thakur Raghunathji Maharaj v. Lal Chand.

*L. K. Jha and M. Rahman* — for Appellants.
*B. N. Mitter and T. Nath* — for Respondents.

**Ray J.**—This appeal arises in a suit instituted by respondent 1, for a declaration that he is the duly constituted mutwalli of Shree Radhakrishnajee in village Jagdispur, and, as such, entitled to remain in possession of the temple of Shree Radhakrishnajee and the residential house of Mt. Jaichha Kuer appertaining thereto as also of the movables specified in the list appended to the plaint, or to recover possession thereof on ejectment of the appellants who have forcibly had occupation of the same as trespassers.

[2] The facts giving rise to this litigation, shortly stated, are that one Agam Tiwari of the aforesaid village died in the year 1912 leaving him surviving his widow late Musammat Jiachha Kuer as his sole heir. The Musammat, in due course, came in possession of his estate. While in such possession, she, in fulfilment of the wishes of her husband, constructed the temple in question and built the houses appertaining thereto, installed the deity Shree Radhakrishnajee therein and dedicated all the properties inherited by her for the seva-puja and upkeep of the deity and the temple. She effected the dedication by a registered wakfnama dated 22-9-1921. For the management of the dedicated properties, she appointed seven panches to form themselves into a committee of management. It

was provided in the said deed that each of the panches was to be life member subject to his removal on the ground of dishonesty and substitution by a newly appointed panch in his stead by the remaining members of the committee. It was further provided that in case of removal by death of any of the panches, any one of his sons or gotias found competent by the other members of the committee was entitled to succeed him in the management. An unexpected contingency, however, arose in the matter of management which had not been provided for in the wakfnama, namely, that all the panches as a body mismanaged the affairs of the temple contrary to the lady's expectation. Thereupon, finding no other way to get possession of the temple and the properties attached thereto, she instituted Title Suit No. 11 of 1939 for their removal in the Court of the District Judge of Arrah. She succeeded in the suit and came into khas possession of the same. While in such possession, she appointed the plaintiff, Parmeshwar Missir, as trustee of the endowment by a deed of wakfnama on 26-5-1940. By virtue of this appointment, the plaintiff entered into management of the deity's affairs and came in possession of the temple along with all the dedicated properties. Musammat Jiachha Kuer, the founder, died on 22-9-1942, whereupon the plaintiff wanted to take her corpse to Benares as she in her lifetime wanted to pass her last days there. The husband of defendant 1, and maternal uncle of defendant 2, Kesho Missir, raised a dispute and prevented the body from being taken to Benares Out of this dispute there arose a police enquiry which ended in the Sub-divisional Officer directing the plaintiff to cremate her in the village. Later, Kesho Missir with the assistance of defendants 1 to 6 created trouble in peaceful possession of the plaintiff and ultimately took forcible possession of the disputed properties after breaking open the lock of the temple. There arose some criminal cases between the parties. In such cases Kesho Missir set himself up as legal heir of late Jiachha Kuer as her guru and questioned the dedication and the appointment of the plaintiff as a mutwalli. Hence, the suit.

[3] On the death of the aforesaid Kesho Missir, his widow, defendant 1, and his sister's son, defendant 2, now appellants in this appeal, contested the suit and raised the following issues:

(1) Is the suit as framed maintainable?

(2) Has the plaintiff valid cause of action for the suit?

(3) Is the valuation of the suit correct, and is the court-fee paid sufficient ?

(4) Are the deeds of wakfnama and Mutwallishiip dated 22-9-1921 and 26-5-1940, respectively, genuine, valid and operative ?

(5) Was Kesho Misser, Guru of Agam Tewari ? If so, did the properties in question vest in him after Mosammat Jiachha Kuer's death as his legal heir ?

(6) Is the plaintiff entitled to the recovery of possession of the disputed temple and house and also to the closer of the door in question ?

(7) Is the plaintiff entitled to any moveable property or its price as mentioned in the plaint ?

(8) To what reliefs, if any, is the plaintiff entitled?

The allegations of the defendants that gave rise to the issues aforesaid will be set out while dealing with such of the issues as have been pressed in the Court below as well as in this Court.

[4] The issues that were pressed at the Bar are issues 1, 4, 5 and 6.

[5] Issue 1 arises out of the allegation that Shree Radhakrishnajee has not been made a plaintiff, and in his absence, respondent 1 cannot maintain the suit. The submission is that in addition to Parmeshwar Missir, mutwalli of Shree Radhakrishnajee (respondent), Shree Radhakrishnajee should have been mentioned as one of the plaintiffs. The plaintiff in this case is described in the following words:

"Parmeshwar Missir son of Pandit Radha Ballam Misra, deceased, by caste Brahman, by occupation cultivator and priest, resident of Jagdishpur, parganna Behea, thana Jagdishpur, district Shahabad, mutwalli of Sri Radha Kishun Jee."

Besides the description already quoted, the body of the plaint clearly manifest that the suit had been instituted on behalf of and in the interest of Shree Radha Kishun Jee and restoration of possession of the disputed properties is sought on his behalf. The question, therefore, arises whether the defect, complained of, in the frame of the suit is such as would entail dismissal thereof. Mr. Jha has relied upon a number of decisions in support of his contention. They are : 52 I. A. 245,[1] 60 I. A. 233,[2] 31 I. A. 203[3] and 33 ALL. 735.[4] The first two cases have no relevance to the facts of this case and do not decide the point under consideration, and the last two cases are definitely contrary to his contention. I shall now proceed to deal with each of these cases seriatim.

[6] In 52 I. A. 245[1] a private household deity was installed in a thakurbari which was dedicated to the Thakur. The deed of dedication provided that the Thakur should not be removed therefrom until another suitable thakurbari was provided. After the founder's death, there was a partition of the family properties between his three sons. In that partition the thakurbari remained joint but each of the sons was allotted equal turns of worship. One of the sons brought the suit which went up to the Privy Council claiming a declaration that he had the right to remove the 'Thakur' to his own house during his turn of worship. To this suit he impleaded his two brothers as parties defendants who objected to such removal. In the suit the plaintiff claimed a temporary ownership of the Thakur during his turn as a moveable property

allotted to him on partition. It was held that the Thakur was a juristic person and could not be claimed as a chattel. It was further held by their Lordships of the Privy Council that the will of the idol as to its location must be respected. Their Lordships observed :

"While, however, this is the only objection actually made by the objecting defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings though the result might conceivably vitally affect its interest. In that sense the contest has related to the establishment of individual rights as between contesting shebaits. Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court."

[7] This decision, therefore, does not go to help the appellants.

[8] The next case I should refer to is 60 I. A. 263.[2] This too has no bearing on the proposition put forward by Mr. Jha. The short facts of the case are that the landlord of a small plot of land brought a suit in ejectment on the ground that the right of occupation was confined to the settlee Ichhakori's family on the ground that the family had become extinct. After the suit was filed, it was found that the sole survivor of that family had made a waqf of the land in suit in favour of "Shree Thakurji Maharaj." The plaintiff applied to amend the plaint by impleading the idol and trustee and by raising a claim that the execution of the deed had the effect of extinguishing the rights, if any, of Bihari, the last survivor. The Munsif allowed the above claim to be raised but without joining the idol or the trustee. The Privy Council came to the conclusion that they were not able to deal with the appeal in the absence of Shree Thakurji Maharaj, whose interest arose under the wakf, or his representative. In a sense this decision goes against Mr. Jha's contention as their Lordships mean to say that the presence of Thakurji's representative in the suit could also suffice. In the present case even if it be assumed that Radhakrishnajee is not the plaintiff, but his representative is there as such.

[9] The case in 31 I. A. 203[3] completely undermines the validity of this contention. Their Lordships held that although a Thakur may be regarded as a juridical person capable, as such, of holding property, especially where the dedication is of the completest character, yet the possession and management of the dedicated property with the right to sue in respect of it are vested in the shebait. In this view, their Lordships held that where the right to sue in ejectment had accrued to the plaintiff as shebait during his minority and suits were brought within three years of his majority, they were not barred. This decision makes it manifestly plain that the right to sue for ejectment of trespassers, as the defendants in the present case are alleged to be, vests in the mutwalli, and he can maintain the suit, without mentioning Radhakrishnajee separately as a plaintiff along with him.

[10] The last case to be dealt with in this connection is the case in 33 ALL. 735.[4] This is a converse case in which the Thakur was made a defendant but not the shebait. The District Judge relying upon an earlier decision of the Allahabad High Court, 19 ALL. 330,[5] in which it had been held that a suit relating to property alleged to belong to a temple could not be brought in the name of the idol of the temple, dismissed the suit. The Full Bench held :

"Defendant 1 in this suit was, therefore, properly described in the plaint, and the view of the learned Judge in this respect is in our judgment erroneous. If there is any defect in the description of the defendants in suit of this kind, it is nothing more than an irregularity or misdescription. If, for instance, a suit on behalf of an idol is brought in the name of the manager of the idol, that would not warrant the dismissal of the suit : but the plaint may be amended by correcting the description. Similarly, in the case of a defendant. Such an amendment would not have the effect of introducing a third party on the record, and no question of limitation, in our opinion, would arise."

The contention of Mr. Jha, therefore, has no substance, and the suit has rightly been held by the Court below to be maintainable in the form in which it has been cast.

[11] The next issue that was pressed was that the husband of defendant 1 and maternal uncle of defendant 2, namely, Kesho Missir was 'guru' of Agam Tewari, husband of Mt. Jiachha Kuer, and thus was the reversionary heir in respect of Agam's estate after the death of Jiachha Kuer. The learned Court below has in a very careful and elaborate judgment come to the finding that the defendants have failed to establish that Kesho Missir was 'guru' of Jiachha Kuer's husband Agam Tewari. We have been taken through the entire evidence adduced by the defendants, and we have been able to find no reason to disagree with the appraisement of evidence by the trial Court. (After discussing the oral and documentary evidence their Lordships agreed with the finding of the lower Court on this issue. The judgment then proceeds thus :)

[12] Lastly, I shall deal with Issues 4 and 6 together. The submission of the appellant's learned counsel in this connection can be divided into two parts : (1) That Jiachha Kuer had no power to dedicate her husband's estate to Radhakrishnaji as she had not been authorised by him; and (2) that the trust being a public one, after removal of the panches, Jiachha Kuer had no power to appoint the plaintiff as a mutawalli. In view of the finding that Kesho Missir was not an heir to the disputed properties after Jiachha's

death, the defendants have no locus standi to impeach the endowment as an unauthorised one. The persons entitled to impeach non-authorised alienation by a widow or other limited heir are obviously the next reversioners. Any person who has no interest in the succession is not entitled to impeach them. Such alienations are in their nature not absolutely void but voidable at the option of the reversioners who may affirm it or treat it as a nullity. This option, however, is confined to persons having interest in the reversion and is not exercisable by any outsider as the present defendants are. In this view of the matter, in spite of the finding of the Court below that the plaintiff has failed to establish that Jiachha's husband authorised her to dedicate the entire property to Radhakrishnajee, the question does not arise for consideration.

[13] The second submission that the plaintiff's appointment as a mutwalli is void is based on the assumption that the trust was a public trust. The submission is that Jiachha Kuer, after having appointed a committee as trustees of the endowment, had divested herself of all interest therein. After removal of the trustees (panches), she could only approach the District Court and could have got a trustee appointed or a scheme of management framed of the trust properties; but she was incompetent to appoint the plaintiff as the trustee. This question too does not arise for consideration in this appeal inasmuch the defendants did not raise the plea that the endowment was a public one in their written statement, nor was there any issue framed. The whole contention was based upon a statement of plaintiff's witness No. 4 in cross-examination that he and other persons make offerings to the idol through pujari. I would rather quote the whole paragraph from the judgment of the learned Court below where he deals with the contention. It reads :

"Further it is contended that the plaintiff could not be motwali of the estate of the Thakurjee. Hence he cannot successfully maintain this suit. In support of this contention it is asserted that as it appears from the statement of P. W. 4 in his cross-examination that he and other persons make offerings to the idols through pujari, the temple may be said to be of a public nature. But this is nothing but a far fetched argument. It is not the case of any party that the temple in question is of a public nature. Hence mere casual statement of a witness of a plaintiff cannot determine its public character. Accordingly I find no force in this contention."

In view of the circumstances we refuse to entertain the argument that the trust was of a public nature; nor do we propose to decide the point in this appeal as it does not arise for consideration.

[14] The learned Court below has found that there was a dedication in favour of Radhakrishnajee and that the mutwalinama by which Jiachha Kuer appointed the plaintiff as a trustee is a genuine document and has since been given effect to, the plaintiff having entered into possession of the dedicated properties as a trustee and having been managing the seva-puja; and that he has been forcibly dispossessed out of the disputed properties by the defendants' predecessor-in-interest and that the same have been wrongly retained in possession by the defendants. We have no reason to differ from these findings.

[15] All the contentions that were advanced by the appellants' learned counsel having failed, the decree of the Court below decreeing the plaintiff's suit must be upheld.

[16] In the result, the appeal fails and is dismissed with costs.

**Manohar Lall J.** — I agree.

K.S. *Appeal dismissed.*

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**A. I. R. (35) 1948 Patna 460** *[C. N. 161.]*

AGARWALA C. J. AND MEREDITH J.

*Radha Mohan Singh — Petitioner—Appellant v. Shree Kishun Gir and others — Opposite Party — Respondents.*

**Civil Revn. No. 178 and A. F. A. D. No. 349 of 1946, Decided on 28-1-1948, against order of 1st Addl. Sub-Judge, Chapra, D/- 4-12-1945.**

**Civil P. C. (1908), O. 41, Rr. 4 and 33 — Joint money decree against defendants — Appeal — One of defendants-appellants dying—His name expunged on application by rest — Claim held false and suit dismissed — There was held no abatement of appeal — Court held could give relief either under O. 41, R. 4 or R. 33 or under both — Civil P. C. (1908), O. 22, R. 3.**

In a money suit a joint decree was passed against five defendants. During the pendency of the appeal one of the defendants-appellants died and before the expiry of limitation for an application for substitution, the remaining appellants filed an application saying that substitution was not necessary as the heir of the deceased was already on record and asked instead that the name of the deceased should be expunged from category of appellants. This was done. The appellate Court held that the claim was false and dismissed the suit. It was contended that the appeal had abated as a whole as the decree was joint and the decision of appellate Court was without jurisdiction :

*Held*, that no question of abatement arose as the name of the deceased appellant had been expunged before the expiry of period of limitation for substitution. There was nothing in law to prevent the Court from hearing the appeal of the remaining defendants and giving relief either under O. 41, R. 4 or under O. 41, R. 33, or both. The decree being a joint decree, the only relief which could be given was to set it aside as a whole : *Case law referred*. [Paras 4, 22]

*Held* further, there was no question of any conflict between O. 22, R. 3 and O. 41, R. 4, and no question of either overriding the other. [Para 26]

Annotation : ('44-Com.) C. P. C., O. 41, R. 4, N. 6; O. 41, R. 33, N. 7; O. 22, R. 3, N. 18.

*Cases referred*:—

1. ('40) 19 Pat. 870 : 27 A. I. R. 1940 Pat. 346 : 188 I. C. 745 (F.B.).

2. ('19) 53 I. C. 543 : 6 A. I. R. 1919 Cal. 410.
3. ('28) 45 All. 286 : 10 A. I. R. 1923 All. 211 : 71 I. C. 321.
4. ('46) 33 A.I.R. 1946 Lah. 399: 227 I. C. 340 (F.B.).
5. ('36) 23 A. I. R. 1936 Cal. 424 : 165 I. C. 606.
6. ('39) 43 C. W. N. 15.
7. ('37) I. L. R. (1937) Bom. 150 : 24 A. I. R. 1937 Bom. 101 : 168 I. C. 629.
8. ('34) 61 Cal. 919 : 22 A. I. R. 1935 Cal. 24 : 154 I. C. 101.
9. ('37) 24 A. I. R. 1937 Oudh 448 : 170 I. C. 636.
10. ('42) 29 A. I. R. 1942 Cal. 257 : I. L. R. (1941) 2 Cal. 556 : 204 I. C. 618.
11. ('36) 23 A. I. R. 1936 Pat. 604 : 165 I. C. 936.

*B. N. Rai and Trishuldhari Singh* — for Appellant.
*Ramanugrah Prasad and S. K. Mazumdar* — for Respondents.

**Meredith J.**—This second appeal and the application in revision are by the plaintiff in a money suit. The claim was for Rs. 1692/3/9, and the learned Munsif gave a joint decree against the defendants five in number. In first appeal the learned Subordinate Judge held that the claim was entirely false, and dismissed the suit.

[2] It is now contended that the appellate decision was incompetent and without jurisdiction in the following circumstances. During the pendency of the appeal, on 16-8-1944, defendant 2 died. On 16th of September before the period of limitation for an application for substitution had expired, the remaining appellants filed an application saying that substitution was not necessary as the sole heir was already on the record, (this was incorrect; there were also other heirs) and asked instead that the name of the deceased defendant 2 be expunged from the category of appellants. This was done.

[3] Later on the respondents filed an application asserting that the appeal had abated as against defendant 2, and consequently the whole appeal had abated as the decree was joint. The Court held that no question of abatement arose in the matter, and that under the provisions of O. 41, R. 4, Civil P. C., it was open to any of the defendants to appeal and get the whole decree set aside, if successful. He then proceeded to dispose of the appeal in the manner already indicated.

[4] Mr. B. N. Rai for the plaintiff relies upon the Full Bench case of *Ramphal Sahu* v. *Satdeo Jha*, 19 Pat. 870,[1] for the proposition that O. 41, R. 4, is not applicable to a case like the present, because it cannot override or create an exception to O. 22, Rr. 3 and 11. The question referred to the Full Bench in that case was, however,

"Has the appellate Court power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4, Civil P. C. if all the plaintiffs or defendants appealed from the decree and one of them dies, and no substitution is effected within time, and an application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused, always assuming that the decree appealed from proceeded on a ground common to all the plaintiffs or defendants ?"

This question was answered in the negative. Therefore, what was decided was that O. 41, R. 4, could not be used to override an abatement. It is no authority at all with regard to the position where there has not been an abatement, and any observations made are *obiter dicta*. The *ratio decidendi* was that the abatement was in substance a decree against the representatives of the deceased appellant, and after that to give a decision in favour of the other appellants would lead to inconsistent decrees, an impossible situation in a joint decree. Thus at p. 887 of the judgment we find :

"The order of abatement is virtually a decree, and so long as it stands must be considered to have determined the rights between the parties."

This proposition may or may not be correct but, in my judgment, it dees not touch the present case. As I see it, there was no abatement in the present case, because defendant 2 had been expunged from the category of appellants before any question of abatement arose, or any abatement could have taken place. The abatement takes place on the expiry of the period of limitation for substitution. Before that event the name of defendant 2 had been expunged. There was no longer any appeal by him. How could his appeal abate at a time when there was no appeal by him before the Court ? Once the name was expunged, the appeal became simply an appeal under O. 41, R. 4 by the remaining appellants, and the case was not one of abatement at all.

[5] Mr. B. N. Rai, however, makes two further contentions. He says, first, that to apply O. 41, R. 4 or O. 41, R. 33 those who have not appealed must be made respondents. All parties to the litigation must be before the Court. Secondly, O. 41, Rr. 4 and 33 cannot be applied in the case of a dead person because there cannot be a decree against a dead person.

[6] I will deal with these points in turn, but I may say at once that I consider both contentions unsound, and, in my opinion, the Court has got ample power under O. 41, R. 4, and O. 41, R. 33 to give relief and do justice in a case like the present.

[7] Mr. B. N. Rai relies first on certain observations in the Full Bench case already referred to. Thus we find in the judgment (at p. 890) :

"To hold the O. 41, R. 4, Civil P. C. applies to a case such as the present one is to hold that a Court can reverse or vary a decree in favour not only of a person who is not before the Court but in favour of a person who is no longer in existence. It appears to me that before a Court can vary a decree in favour of the representatives of the deceased appellant such representatives must be brought on the record."

As I have already indicated, these observations are *obiter* because the question before the Court was merely as to the position where there had been an abatement and an order refusing to set it aside. With respect, I think these observations take too narrow a view of the scope of Rr. 4 and 33.

[8] Mr. B. N. Rai relies upon three cases for his proposition that to apply O. 41, R. 4, all the plaintiffs and the defendants must be on the record either as appellants or as respondents. The first is *Balram Pal* v. *Kanysha Majhi*, 53 I. C. 548.[2] That, however, was a case where there had been an abatement. *Ambika Prasad* v. *Jhinak Singh* (45 ALL. 286)[3] purports to follow 53 I. C. 548[2] and applies it to a case where one of the plaintiffs dies who has never joined in the appeal. In such circumstances, the decree was held a nullity as against a deceased person. That was not laid down in 53 I. C. 548.[2] The third case, *Nanak* v. *Ahmad Ali*, A. I. R. 1946 Lah. 399,[4] was also a case of abatement, though it is true that there was an observation that to apply O. 41, R. 4 all must be impleaded. It is not an authority on that point.

[9] I will make two quotations from Chitaley and Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn. Volume 3, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered. At p. 3009, with reference to O. 41, R. 4, they say :

"There is a conflict of opinions as to whether this rule applies to cases where one of the plaintiffs or defendants appeals without impleading the other plaintiffs or defendants as parties to the appeal. The High Courts of Bombay, Calcutta and Madras and the Chief Court of Oudh hold that it does. But the Lahore High Court and the Judicial Commissioner's Court of Peshawar hold that it does not. Opinion of the High Court of Allahabad is confiicting, some cases holding that it does and some that it does not. It is submitted that the former view is correct."

[10] Then, with regard to O. 41, R. 33, at p. 3165 they say :

"The appellate Court can exercise its power under this rule in favour of parties to the suit who were not impleaded as parties to the appeal. A contrary view has, however, been taken in the undermentioned cases. It is submitted that this view is not correct as it is inconsistent with the express provisions of the rule, which uses the words 'respondents or parties'."

That is just the point which appeals to me. In O. 41, R. 33, the word "respondents" is used. If it was intended to confine the application of the rule to parties who had been impleaded either as appellants or as respondents, that would have been enough, and the addition of the words "or parties" would have been entirely redundant.

[11] There is a considerable volume of authority in support of the view I take. Thus in *Gopesh Chandra Aditya* v. *Benode Lal Das* (A. I. R. 1936 Cal. 424),[5] where it was contended that the Municipal Board not being made a party to the appeal, it was incompetent, the Court held that the defence of the Municipal Board and the appellant being the same, and the decree having proceeded upon a common ground, the appellant had accordingly by himself a right to prefer the appeal.

[12] In *Fazal Rahaman* v. *Abdul Rashid* (43 C. W. N. 15)[6] it was held that though the discretionary power under Rr. 4 and 33 should be applied cautiously, it can in suitable cases be applied in favour of persons not parties to the appeal.

[13] *Gurunath Khandappagouda Patil* v. *Venktesh* (I. L. R. (1937) Bom. 150)[7] was a case where a decree was given with costs against all the defendants. This decree was executed for costs against defendant 3, and a sum was recovered from him. Defendants 1 and 2 appealed to the High Court, but failed, and then appealed to the Privy Council where they succeeded. The entire suit was dismissed with costs throughout. Defendant 3 had not been made party to these appeals. Subsequently, relying upon the decision, defendant 3 applied for restitution under S. 144, Civil P. C., and this was allowed.

[14] In *Kamalakanta Deb Nath* v. *Tamijaddin* (61 Cal. 919)[8] we find :

"Reading Rr. 4 and 33 of O. 41, Civil P. C., together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on a ground common to all of them and that the appellate Court may thereupon exercise a power of varying the decree in favour of the non-appealing defendants although they have not been made parties to the appeal."

To exactly the same effect is *Duli* v. *Badri Prasad* (A. I. R. 1937 Oudh 448).[9]

[15] In *Girija Prasanna Deb Gupta* v. *N. M. Khan* (A. I. R. 1942 Cal. 257)[10] it was laid down that O. 41, R. 33 authorises the appellate Court to pass any decree which ought to have been passed by the trial Court. The word "parties" in O. 41, R. 33 is wide enough to include persons who were parties to the suit in the trial Court, but were not parties to the appeal.

[16] In *Deonarain Sahu* v. *Ganesh Ram* (A. I. R. 1936 Pat. 604)[11] there is an observation by a Bench of this Court which, though no doubt *obiter*, is in point. It is :

"Order 41, R. 33. . . . places the Court in a position of doing justice between the parties that is to say, if the effect of the decision at which the Court arrives is to affect the rights of a person who is not a party to the appeal, yet relief may be granted to that person so long as that person was a party to the action in the first instance."

[17] There is nothing whatever in the terms of R. 4 to suggest that the persons, who did not appeal, must be impleaded as respondents, and

were it necessary, one would expect words to that effect in the rule. In Rule 33, there is, as I have already indicated, a direct indication to the contrary effect. Neither rule offends the principle that an order cannot be passed to the prejudice of a person in his absence, because the terms of each rule carefully and expressly limit its application to orders in favour of the absent person, so that no question of any objection by him being shut out can arise.

[18] There remains Mr. B. N. Rai's last contention, that a dead person is not a party at all, and, therefore, there can be no decree against him or in his favour. With the greatest respect to the observations in 19 Pat. 870,[1] I think no question of any decree against or in favour of a dead person ever arises. The proposition "there cannot be a decree against a dead person" seems to me to rest on a confusion of thought. What we have in such a case is a decree against the legal representatives of such a person, who have not been brought on the record. But the existence of legal representatives of a dead person does not depend upon their being substituted in the record or impleaded. The well-known expression "there cannot be a decree against a dead person," if at all correct, really has its justification in the wider principle "there cannot be a decree against persons who have not been made parties." The same considerations are not applicable where the decree is in favour of such persons. Once it is conceded that it is not necessary to implead the non appealing party or his representatives as respondents, then, so far as I can see, it makes absolutely no difference whether there has been a death or not. For if the legal representatives have not replaced the deceased in the little world of the Court they have done so in the world outside; and if a decree can be passed in favour of a man who has not been brought on the record, I see no reason why that cannot be done in favour of his legal representatives when he dies, without bringing them upon the record, and it ought to be done where refusal to do so will involve a great injustice to persons who have appealed, as in the present case.

[19] There is another aspect of the matter. The Patna Full Bench decision itself proceeds upon the theory that the abatement is virtually a decree, a decree which has ensued upon failure to prosecute the appeal. Against whom is this decree? The Full Bench itself says it cannot be against a dead person. Therefore, it is not against the deceased appellant. It can then only be a decree against his representatives, and the theory is that there being a final decree against his representatives, there cannot be any inconsistent decree in favour of the appellants. Those representatives, however, have incurred the decree against them without ever being substituted or ever being impleaded. If such a thing can happen, what objection can there be to the decree in favour of such persons?

[20] That the decree upon abatement is a decree against the representatives of the deceased and not against the remaining appellants becomes clear from an analysis of the provisions of O. 22, R. 3. We got it from O. 22, R. 11, that we should substitute the word "appellant" for the word "plaintiff", the word "respondent" for the word "defendant", and the word "appeal" for the word "suit". Let us do so and see how R. 3 reads. It becomes: 3 (1) Where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant or appellants alone.... the Court on an application made in that behalf shall cause the legal representatives of the deceased appellant to be made a party, and shall proceed with the appeal; (2) where, within the time limited by law, no application is made under sub-r. (1), the appeal shall abate so far as the deceased appellant is concerned, and on the application of the respondent the Court may award to him the costs which he may have incurred in defending the appeal, to be recovered from the estate of the deceased appellant.

[21] Note that under this provision the decree for costs is clearly to be against the legal representatives of the deceased appellant, and not against the other appellants.

[22] In my judgment there was nothing in law to prevent the Court from hearing the appeal of the remaining defendants in the present case and giving relief either under O. 41, R. 4 or under O. 41, R. 33, or both. The decree being a joint decree, the only relief which could be given was to set it aside as a whole.

[23] The application in revision fails. As for the second appeal it is completely without merit, the matter being concluded by findings of fact.

[24] I would accordingly dismiss both with costs. It is unnecessary to assess any separate hearing fee in the revision.

[25] Before I conclude I would like to express my personal opinion that *Ramphal Sahu* v. *Satdeo Jha* (19 Pat. 870)[1] may upon a proper occasion need reconsideration by a larger Bench. Previous to this decision the current of authority was fairly evenly divided. It is further noteworthy that when the answer of the Full Bench to the question propounded came back to the Division Bench hearing the first appeal in question, that Bench was so struck by the manifest injustice which that answer involved that it resorted to the inherent power of the Court to override the provisions of the statute, as inter-

preted by the Full Bench, and to give relief to the appellants. I do not myself believe in any such inherent power of the Court to override statutory provisions. But in my opinion there is no question of overriding them.

[26] The analysis of O. 22, R. 3, which I have made above, clearly suggests that the default is regarded as being on the part of the representatives of the deceased and not on that of the remaining appellants. If the abatement was regarded as owing to the default of the remaining appellants in not applying for substitution, one would expect the law to provide for the decree for costs being against them. But, as I have shown, it provides only for a decree for costs against the representatives—the persons really in default. It is true that it is the duty of the appellants to see that the appeal is properly constituted, and, therefore, if it was necessary to implead the representatives either as appellants or as respondents, there would indeed be a default on their part. I have held, however, that the law does not necessitate impleading the representatives to make the appeal properly constituted. The appeal is still properly constituted without them, having regard to the provisions of O. 41, R. 4, and there is no duty upon the remaining appellants to apply for substitution, if they like to proceed with the appeal as on appeal under O. 41, R. 4, I see no reason why, if they do so and succeed upon the merits, they should not secure a reversal of the whole decree, including the decree as against the deceased. It is true that as regards the representatives the appeal has abated, but I think an abatement must be distinguished from a decree upon the merits. An abatement merely means that the right of appeal on the part of the person concerned is gone, and that the decree of the trial Court stands confirmed in that respect. It is different from an appellate decree upon the merits. The appellate Court has the power to set aside an abatement, but so far as a decree upon the merits is concerned it becomes functus officio. If interpreted in the way I suggest, there is no question of any conflict between O. 22, R. 3 and O. 41, R. 4, and no question of either overriding the other.

[27] **Agarwala C. J.** — I agree that the appeal and application should be dismissed for the reasons stated by Meredith J.

S.C. *Appeal and application dismissed*

END

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